TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM [redacted] 1924

No. [redacted] 185

GEORGE W. BUSH & SONS COMPANY, PLAINTIFF IN ERROR,

vs.

WM. M. MALOY, J. FRANK HARPER, AND EZRA B. WHITMAN, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

143 Md

FILED [redacted], 1925

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[fol. 1] [Caption in Court of Appeals omitted]

[fol. 2] [Title omitted]

[fol. 3] IN THE

CIRCUIT COURT OF BALTIMORE CITY

GEORGE W. BUSH & SONS COMPANY

vs.

WILLIAM M. MALOY, J. FRANK HARPER, and EZRA B. WHITMAN, Constituting the Public Service Commission of Maryland

BILL OF COMPLAINT—Filed 21st December, 1922

The bill of complaint of the plaintiff, George W. Bush & Sons Company, respectfully shows unto your Honor:

(1) That the plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, and has heretofore been engaged, among other things, in the transportation of freight by motor trucks as a common carrier between points in said State of Delaware and between points in the State of Delaware and other States.

(2) That the defendants, the said William M. Maloy, J. Frank Harper and Ezra B. Whitman, by due appointment and qualification, now constitute and at all times hereinafter mentioned constituted the Public Service Commission of the State of Maryland.

(3) That for a period of approximately eighteen months prior to the 10th day of November, 1922, the plaintiff was engaged in transporting by means of motor trucks goods and merchandise as a common carrier for hire between points in the State of Maryland and points in the State of Delaware, and States other than the State of Maryland, limiting its said business solely to transportation of goods and merchandise and other property in interstate commerce. That plaintiff operates as a common carrier a line of steamboats upon the Delaware River for the transportation for hire of goods, merchandise and other property between the City of Wilmington, Del., and the City of Philadelphia, Pa., and other cities upon said Delaware River, and the said line of motor trucks operated by this plaintiff as aforesaid between points in Maryland and points in the State of Delaware and points in States other than the State of Maryland, was established for the purpose of affording a connection between [fol. 4] points in Maryland and points upon said Delaware River upon the route of plaintiff's said steamboat line. The plaintiff further alleges that some time prior to said 10th day of November it was notified by the said Public Service Commission of Maryland that it,

the said plaintiff, would be required to file its application with and obtain a permit from said Commission before it could lawfully conduct its said business of a common carrier by means of motor trucks between points in the State of Maryland and points in the State of Delaware, although its said business was limited to the carriage of goods in interstate commerce solely. That on or about the 10th day of August, 1922, the plaintiff, in the form prescribed by law, filed its application with the said Public Service Commission for a permit for the operation of motor vehicles for public use as a common carrier of freight between points in the State of Maryland and between points in the State of Maryland and the State of Delaware and other States a duly certified copy of said application is herewith filed with this bill of complaint, marked "Plaintiff's Exhibit A," and is hereby referred to and prayed to be taken as a part of this bill of complaint; that at the time of filing said application this plaintiff undertook to comply with all valid rules and regulations of the State of Maryland or any of its governmental agencies relating to or governing the operation of automobiles and motor trucks for hire over and upon the highways of the State of Maryland.

(4) That the said defendants, constituting the Public Service Commission, as aforesaid, did on the 24th day of November, 1922, by order duly passed, fix the 29th day of November as the day upon which said defendants, constituting said Commission, would hear the said plaintiff respecting its application filed as aforesaid with said Public Service Commission; that accordingly on said 29th day of November, 1922, this plaintiff was present at the meeting of said Commission on said day with its counsel and witnesses and produced testimony before said Commission respecting the matters and facts set forth in said application; that at said hearing the said plaintiff requested said Public Service Commission that the plaintiff's application filed as aforesaid should be deemed and taken as an application for permission to operate as a common carrier a line or lines of motor trucks to carry freight for hire between points in the State of Maryland and points in the State of Delaware doing both an interstate and an intrastate business, and also as a separate and independent application for permission to operate as a common carrier [fol. 5] a line of motor trucks to carry freight for hire between points in the State of Maryland and points in the State of Delaware or states, other than Maryland, doing an interstate business solely, which said request of the plaintiff to have its application so regarded was granted by the said Commission and said application was acted upon by it with that understanding and the said plaintiff at said hearing undertook that if a license were granted to it by the said Commission to do an interstate business solely, it would take out and pay for all licenses and comply in all respects with the terms and provisions of any statute or statutes of the State of Maryland or with any rules or regulations prescribed by any agency or instrumentality of the State of Maryland affecting or regulating trucks transporting freight between points of the State of Maryland and on or over the highways

thereof; all of which will appear from a duly certified copy of the order of said Public Service Commission of Maryland, passed in said matter after the hearing aforesaid, which is filed herewith marked "Plaintiff's Exhibit B" and is prayed to be taken as a part of this bill of complaint.

It will further appear from said order passed by said Public Service Commission as aforesaid that said Commission declared that said application of said plaintiff to operate a line or lines of motor trucks for the transportation of goods, merchandise and other property in interstate commerce solely between points in the State of Maryland and points in the State of Delaware and states other than the State of Maryland would be prejudicial to the welfare of the public, and the said Commission ordered that its permission and approval to this plaintiff to operate a line or lines of motor trucks and by means thereof to carry goods as a common carrier between points in Maryland and points in Delaware and states other than the State of Maryland doing interstate business solely should also be refused and denied.

(5) The plaintiff further avers that upon the facts appearing in its said application to said Public Service Commission as the same is recited in said order for the permission and license aforesaid to operate motor trucks for the transportation of freight as a common carrier in interstate commerce solely, between points in the State of Maryland and points in the State of Delaware it, the said plaintiff, was clearly entitled to have said license and permission granted to it by said Commission for said purpose; that this plaintiff is finan- [fol. 6] cially responsible and is capable of providing the means for the carrying on of said business as a common carrier as hereinbefore mentioned, and to conduct said business in compliance with all the requirements of the law of the State of Maryland applicable thereto; that it has heretofore for a great many years been engaged in the business of a common carrier between points in the State of Delaware and other states and has conducted said business with success; that the plaintiff has the facilities now at its command to immediately engage in said business of transporting goods and merchandise and other property in interstate commerce as a common carrier as aforesaid and that it is ready and anxious to engage therein and is only prevented from so doing by the said action of the said Public Service Commission of Maryland; that the plaintiff is greatly aggrieved and irrepabably injured by said ruling and order of said Public Service Commission in that it cannot so engage in said business without subjecting itself to the risk of the enforcement against it by the said Public Service Commission of certain ruinous penalties. That said Commission being of the opinion and having held as appears from said order that plaintiff is not entitled to engage in the business of interstate transportation in the manner aforesaid without the permission of said Commission, it will deem it to be its duty to enforce against this plaintiff the heavy penalties of the law imposed upon any person or corporation violating any order of said Commission. That accordingly if plaintiff should now undertake to operate

the said line of motor trucks as a common carrier in interstate commerce solely as hereinbefore described, it will subject itself to prosecution by said Commission, its officers, agents and servants employed in connection with said business will be arrested, and said business will be interfered with, and destroyed, and plaintiff will be subjected to a multiplicity of suits and prosecutions to its irreparable damage, all of which damage and injury is incapable of admeasurement or adjudication at law.

(6) That it will appear from said order of said Commission, passed as aforesaid, filed herewith as "Plaintiff's Exhibit B," that the said Commission expressly and separately ruled that the plaintiff would not be permitted or allowed to engage in the business of transporting freight by motor trucks as a common carrier between points in the State of Maryland and the State of Delaware, thereby conducting a purely interstate business, plaintiff having expressly requested the [fol. 7] said Commission to regard its application as containing a separate and distinct application to engage in an interstate business solely between the points in the State of Maryland and in the State of Delaware; and it further appears from said copy of said order that said Commission undertook, and did, in fact, so rule upon plaintiff's said application; that said Commission has refused to permit the said plaintiff to engage solely in such interstate commerce between the States mentioned, but, upon the contrary, has expressly refused to permit or allow plaintiff to engage in or carry on said business. This plaintiff is advised by counsel that under the Constitution of the United States it has the right to engage in said business of transporting freight by motor trucks in interstate commerce solely in the manner aforesaid between points in the State of Maryland and points in the State of Delaware and States other than the State of Maryland without any interference, hindrance or obstruction on the part of the said Commission; that plaintiff undertook at said hearing, and now undertakes, to comply with all statutes of the State of Maryland and all rules and regulations passed in pursuance thereof regulating the use of motor trucks for hire on and over the highways of the State of Maryland or within the boundaries of the State of Maryland; that it is prevented from engaging in said interstate commerce and complying with said statutes and rules and regulations solely on account of the said ruling, action and order of said Commission; that plaintiff now has the facilities for properly conducting said business and operating said motor trucks in the manner aforesaid, but is deterred and hindered therefrom solely by the action of said Commission which will necessarily follow the attempt of plaintiff to engage in said business, namely, the attempted enforcement against it of said disastrous and ruinous penalties.

The plaintiff further avers that by Section 53 of the Act creating and establishing the said Public Service Commission of Maryland, the same being the Act of 1910, Chapter 180 (now codified in Bagby's Code as Article 23, Section 467), it is expressly provided that nothing in said act contained shall be deemed or construed to apply to or operate upon interstate or foreign commerce, and that accordingly

under the law organizing said Commission and defining and limiting its powers and duties it is forbidden to interfere with or to exercise or attempt to exercise any jurisdiction or control over interstate or foreign commerce; that by the action of said Commission in making the ruling and passing said order denying plaintiff the right to engage [fol. 8] in interstate commerce in the manner aforesaid this plaintiff was and is deprived of the right guaranteed to it by the Constitution of the United States to freely engage in commerce between the several States of the United States, and it hereby and herein expressly asserts and claims said right and avers that the action of said Commission is a denial and deprivation thereof, and is, therefore, in violation of the Constitution of the United States and utterly null and void.

For as much, therefore, as your complainant is without remedy in the premises except in a court of equity, and to the end that it may obtain from this honorable Court the relief to which it is by right and equity entitled, it respectfully prays that the above defendants constituting the Public Service Commission of Maryland be directed full, true and perfect answer to make to this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and that the said defendants, and each of them, their agents, servants, employees, subordinates and each and every of them be enjoined and restrained from in any manner enforcing or attempting to enforce or causing to be enforced against the plaintiff, its officers, agents, servants or employees, or any of them, any pains, penalties or forfeitures or from prosecuting or causing to be prosecuted the plaintiff, its officers, agents, servants or employees, or any of them, for or on account of any alleged violation of law or any order of said Commission prohibiting such violation which consists solely in the operation of motor trucks or a line of motor trucks between points in the State of Maryland and points in the State of Delaware, carrying goods, merchandise or other property in interstate commerce only without a permit from said Public Service Commission.

Plaintiff further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the said defendant, its agents, servants, subordinates and employees, and each and every of them, be enjoined and restrained as hereinbefore prayed, and that upon final hearing the said injunction shall be made perpetual.

Wherefore the plaintiff prays that a writ of subpœna be issued herein, directed to the above-named defendants constituting the Public Service Commission of Maryland commanding them on a day certain to appear and answer this bill of complaint.

[fol. 9] The plaintiff further prays for such other, further and general relief as equity may afford and to this Court may seem proper.

And as in duty bound, etc.

George W. Bush & Sons Company, By Henry T. Bush, President. Marbury, Gosnell & Williams, Solicitors for Plaintiff.

Jurat showing the foregoing was duly sworn to by Henry T. Bush omitted in printing.

PLAINTIFF'S EXHIBIT A TO BILL OF COMPLAINT—Filed 21st December, 1922

PUBLIC SERVICE COMMISSION OF MARYLAND

Application for Permit for Operation of a Motor Vehicle

Application is hereby made to the Public Service Commission of Maryland for a permit for the operation of a motor vehicle for public use as follows:

[fol. 10] Date: 8/10/22.

1. Name of owner or owners: George W. Bush and Sons Company.

2. Postoffice address: Wilmington, Delaware.

3. Nature of service: Passenger—Freight (see note) yes.

4. Route or routes to be operated (specify for week days, holidays and Sundays separately): Sheet No. 1 attached.

5. State what additional or special service is contemplated: ——.

6. Total vehicles owned in regular service, 4. In reserve, to be used only in emergencies, 3.

7. Give complete schedule of operation: ——.

From	To	First car out	Last car in	Schedule trips A. M.	Schedule trips P. M.	Trips daily
.....	.....	.....	.....	.....	.....	.....

See sheet No. 1 attached.

8. (a) Rates or cash fare:

Passenger Rates:

From	To	Fare one way Adult	Fare one way Child
.....	.....	.....	.....

Freight Rates:

From	To		
.....	.....	.....	.....

See sheet No. 2 attached.

(b) Commutation rates by tickets or otherwise: No.

9. Give full information as to transfers issued or exchanged: No.

10. Number and duties of employees other than drivers: ——.

11. Location where vehicles are parked or stabled: Foot of French Street, Wilmington, Del.

[fol. 11] Specifications of Vehicles

Chassis or Running Gear:

12. Number of each type owned, and year built new (give designation of manufacturer): Autocar; 2-ton; 1918.

13. Frame: Length, eleven feet nine inches. Width, thirty-five inches. Overhang rear axle, twenty-three inches.

14. Body end over rear of frame, twenty-two and a half inches.

15. Wheel base, ninety-seven inches. Gauge (between center of tires), fifty-nine inches.

16. Engine or motor horsepower, eighteen. Number cylinders, two. Diameter of cylinders, four and three-quarter inches.

17. Size of tires: Front, 34 x 5 single. Rear, 34 x 6 single.

18. Tires, solid or pneumatic: Front, solid. Rear, solid.

19. Number and kind of brakes:

Body:

20. Length inside, nine feet three and one-half inches. Width inside, sixty and one-half inches. Width over all seventy-two inches.

21. Seating capacity, including driver: ——.

22. Arrangement of seats (longitudinal or transverse): ——.

23. Total length of seats: ——.

General:

24. Weight, complete without passengers, 4,600 pounds. Capacity, pounds, 4,000 pounds.

25. Character of entrance and exit (step and door): ——.

[fol. 12] 26. Remarks (special data not included above): ——.

And I do hereby certify that I have received and read a copy of Order- No-. 6329 and 6960, of the Public Service Commission of Maryland, and I agree to comply with the provisions thereof.

And I do further agree to secure license from the Commissioner of Motor Vehicles and begin operating within thirty (30) days after the issuing of this permit or show good cause why the same has not been done.

Sign here: (Sgd.) George W. Bush and Sons Company.
Henry T. Bush, President.

PUBLIC SERVICE COMMISSION OF MARYLAND, TRANSPORTATION DEPARTMENT

Permit No. —, issued to us/me for the operation of a freight passenger motor vehicle from —— to ——, is issued with the understanding that no transfer of same will be allowed by the Public Service Commission of Maryland, and, in accepting this permit, we hereby agree to comply with this condition.

(Signed) George W. Bush and Sons Company. Henry T. Bush, President. Witness: (Sgd.) S. W. Mears. (Date:) —— —, ——.

[fol. 13] Bush Line

Routes and Operating Schedule Between Wilmington, Delaware, and Points in the State of Maryland

Read Down

A. M.	A. M.		P. M.	P. M.
(a) 7.30	(a) 11.30	.....Wilmington, Del.....	(a) 6.30	(a) 5.30
	P. M.			
(a) 9.00	(a) 1.00	.....Elkton, Md.....	(a) 5.00	(a) 4.00
A. M.	A. M.		P. M.	P. M.
(c) 9.00	.....	....Chesapeake City, Md....	(c) 4.30	.....
(c) 10.30	.....	.....Cecilton, Md.....	(c) 3.30	.....
(c) 10.40	.....	.....Frederickstown, Md.....	(c) 3.20	.....
(c) 10.45	.....	.....Georgetown, Md.....	(c) 3.15	.....
(c) 11.00	.....	.....Galena, Md.....	(c) 3.00	.....
(c) 11.15	.....	.....Locust Grove, Md.....	(c) 2.45	.....
(c) 11.45	.....	.....Kennedyville, Md.....	(c) 2.15	.....
P. M.				
(c) 12.30	.....	.....Chestertown, Md.....	(c) 1.30	.....
A. M.				P. M.
(d) 9.30	.....	.....Singerly, Md.....	(d) 12.30	.....
(d) 9.40	.....	.....Cherry Hill, Md.....	(d) 12.20	.....
(d) 9.50	.....	.....Andora, Md.....	(d) 12.10	.....
(d) 10.00	.....	.....Providence, Md.....	(d) 12.00	.....
A. M.				P. M.
(b) 9.30	.....	.....North East, Md.....	(b) 1.00	.....
(c) 9.45	.....	.....Charlestown, Md.....	(c) 12.55	.....
(c) 10.05	.....	.....Principio Furn., Md.....	(c) 12.35	.....
(c) 10.20	.....	.....Perryville, Md.....	(c) 12.20	.....
(c) 10.40	.....	.....Havre de Grace, Md.....	(c) 12.00	.....

(a) Daily except Sunday.
(b) Runs Monday and Thursday only.
(c) Runs Tuesday and Friday only.
(d) Runs Wednesday and Saturday only.

[fol. 14] I hereby certify that I have examined the aforegoing application and recommend that the same be granted.

Remarks: ——.

——, Transportation Expert. Date: —— —, ——.

Before the Public Service Commission of Maryland

Order No. —

In the Matter of the Application of —— —— for a Permit for the Operation of a Motor Vehicle for Public Use

The aforegoing application and recommendation having been duly considered, it is this — day of ——, 19—, by the Public Service Commission of Maryland,

Ordered, That the same be granted and that the permit applied for be issued.

—— ——, Commissioners.

STATE OF MARYLAND,
Office of the Public Service Commission, ss:

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of the Public Service Commission at the City of Baltimore this 21st day of December, one thousand nine hundred and twenty-two.

B. T. Fendall, Secretary. (Seal.)

[fol. 15] PLAINTIFF'S EXHIBIT B TO BILL OF COMPLAINT—Filed 21st December, 1922

BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND

Order No. 7192. Case No. 2071

In the Matter of the Application of GEORGE W. BUSH & SONS COMPANY for Permits to Operate Motor Vehicles for Public Use in the Transportation of Freight Between the Maryland-Delaware State Line and Elkton, Chestertown, Providence, Havre de Grace and Intermediate Points

Whereas, The George W. Bush & Sons Company, a corporation organized under the laws of the State of Delaware, has applied to this Commission under the provisions of Section 4 of Chapter 714 of the Acts of the General Assembly of Maryland, session of 1916, as amended by Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland, session of 1922, for permits to operate motor vehicles over State, State aid, improved county roads and streets and roads of incorporated towns or cities in the State of Maryland, in the public transportation of merchandise or freight over specified routes between Chestertown, Maryland and the Maryland-Delaware State line by way of Elkton, between Providence, Maryland and the

Maryland-Delaware State line by way of Elkton, and between Havre de Grace, Maryland, and the Maryland-Delaware State line by way of Elkton; and,

Whereas, It is the declared intention and purpose of the applicant to extend the operation of its said motor vehicles through and beyond the said Maryland-Delaware State line to Wilmington and other points in the State of Delaware; and,

Whereas, The applications having come on to be heard after due notice, the said applicant at the hearing requested that the said applications be deemed and taken as applications for permits to operate motor vehicles in the public transportation of merchandise or freight over the aforesaid State, State aid, improved county roads and streets and roads of incorporated towns or cities in the State of Maryland, in the doing of both an intrastate and interstate business, and also as separate and distinct applications for permits to operate motor vehicles in the public transportation of merchandise or freight over the aforesaid State, State aid, improved county roads and streets and roads of incorporated towns or cities in the State of Maryland, [fol. 16] in the doing of an interstate business solely, and the said applicant also undertook that if, under the permits so as aforesaid applied for, should said permits be issued to it, its motor vehicles were operated over said roads and streets in the State of Maryland in the doing of an interstate business solely, it would take out and pay for all required licenses and otherwise comply in all respects with the terms and conditions of any statute or statutes of the State of Maryland, and with any rules or regulations prescribed by any instrumentality of the State of Maryland affecting or regulating motor vehicles engaged in the public transportation of merchandise or freight over specified routes on or over public highways of the said State; and,

Whereas, It being the opinion and finding of the Commission, after due hearing, that the public welfare and convenience do not require the granting of the permits for which applications have been made as aforesaid by the said the George W. Bush & Sons Company, but that, on the contrary, the granting of such permits would be prejudicial to the welfare and convenience of the public,

It is, therefore, this 20th day of December, in the year nineteen hundred and twenty-two, by the Public Service Commission of Maryland,

Ordered: That the applications of the George W. Bush & Sons Company in this case exhibited for permits to operate motor vehicles over State, State aid, improved county roads and streets and roads of incorporated towns or cities in the State of Maryland, in the public transportation of merchandise or freight over specified routes between Chestertown, Maryland and the Maryland-Delaware State line by way of Elkton, between Providence, Md., and the Maryland-Delaware State line by way of Elkton, and between Havre de Grace, Md., and the Maryland-Delaware State line by way of Elkton, in the doing of both intrastate and interstate business, and for permits to operate motor vehicles over the aforesaid roads and streets in the State of Maryland in the public transportation of merchandise or

freight over specified routes between the several points hereinbefore mentioned in the doing of interstate business solely, be and the same are hereby refused and dismissed.

William M. Maloy, J. Frank Harper, Ezra B. Whitman, Commissioners.

[fol. 17] STATE OF MARYLAND,
Office of the Public Service Commission, ss:

I have compared the preceding copy with the original Order No. 7192, in the matter of the application of George W. Bush & Sons Company for permits to operate motor vehicles for public use in the transportation of freight between the Maryland-Delaware State line and Elkton, Chestertown, Providence, Havre de Grace and intermediate points, Case No. 2071, on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of office of Public Service Commission, at the City of Baltimore, this twentieth day of December, one thousand nine hundred and twenty-two.

B. T. Fendall, Secretary. (Seal.)

IN THE CIRCUIT COURT OF BALTIMORE CITY

MOTION FOR PRELIMINARY INJUNCTION—Filed 22nd December, 1922

The plaintiff moves the Court to grant a preliminary injunction in the above entitled case.

Marbury, Gosnell, Williams, Counsel for Plaintiff

IN THE CIRCUIT COURT OF BALTIMORE CITY

ORDER SETTING MOTION FOR HEARING

The bill of complaint and affidavit thereto and the motion of the plaintiff for a preliminary injunction in the above entitled case having been read and considered, it is ordered this 22nd day of December, 1922, that the said motion of said plaintiff for a preliminary injunction be and the same is hereby set for hearing on the 28th day of December, 1922, provided a copy of this order be served upon the defendant on or before December 22nd, 1922.

Carroll T. Bond.

[fol. 18] IN CIRCUIT COURT OF BALTIMORE CITY

DEMURRER—Filed 27th December, 1922

To the Honorable the Judge of said Court:

The defendant, the Public Service Commission of Maryland, demurs to the whole bill of complaint filed against it in this case and assigns as special grounds of said demurrer:

1. That this Court has no jurisdiction to hear and determine the questions raised and presented by the bill of complaint.

2. That this Court has no jurisdiction to grant the relief prayed for in the bill of complaint.

3. That the order of this defendant, No. 7192, passed December 20th, 1922, a copy of which, marked "Plaintiff's Exhibit B," was filed as a part of the bill, is a proper and valid order, and was passed by this defendant in the exercise of the police power of the State, vested in it in relation to a subject over which this defendant had full constitutional powers.

4. That the plaintiff has no right to operate over the highways of the State of Maryland motor trucks of the kind and for the purpose stated in the bill of complaint, without the authority or permission of the State of Maryland, conferred or granted by this defendant.

As in duty bound, etc.

William M. Maloy, J. Frank Harper, Ezra B. Whitman. Constituting the Public Service Commission of Maryland. N. Charles Burke, General Counsel of the Public Service Commission of Maryland.

(Affidavit attached.)

[fol. 19] IN CIRCUIT COURT OF BALTIMORE CITY

OPINION—Filed 22nd January, 1923

The complainant is a corporation organized under the laws of Delaware. And the Public Service Commission of this State has refused to grant it a permit under Section 4 of Chapter 401, of the Acts of 1922, for the establishment of a line of motor trucks, carrying freight for hire, but in interstate carriage only, between Wilmington, Delaware and selected points on the Eastern Shore of Maryland. The complainant contends that the statute does not undertake to confer upon the Commission any power in reference to interstate carriage purely, and that if it did the State could not, in accordance with the Federal Constitution, require a permit to be obtained from the Commission, or from any other agency, as a condition to such carriage on the line proposed by the carrier.

The controversy arises under the Maryland statutory provision for a preliminary determination of the question whether a proposed new service by motor vehicles would or would not be prejudicial to the welfare and convenience of the public. This provision, sowewhat varied in details, is common to the public utility laws of all, or nearly all, the States, and is similar to the provision in Section 1, paragraph 18, of the Federal Interstate Commerce Act with respect to the forms of transportation affected by that act. The Interstate Commerce Act does not apply to motor vehicle transportation, and if any "certificate of convenience," as it is often called, may be required at all for a new interstate carrier of this sort, it must be required under a State statute. Whether this can be done conformably to the Constitution of the United States seems not yet to have been decided by any court in the country. Two public service commissions have decided that until Congress undertakes to cover the subject, if it ever does, State statutes may operate and cover it.

Chambersburg, &c., R. Co. vs. Hardman (Pennsylvania), Public Utilities Reports 1921 C. 628;

In re Engelke (New York) Public Utilities Reports, 1922 C. 71.

In the greater number of cases under State statutes the commissions have had to consider only the question of the effect of an additional service along the specified route, in competition with serv- [fol. 20] ice already provided. Counsel for the complainant argue the case upon the assumption that this question was the only one considered by the Commission in this instance; and counsel for the Commission argue, in support of the refusal of a permit, that consideration of the effect on the roads selected and on road traffic might alone have required this action. There is no opinion from the Commission stating its reasons, and so no way for this court to determine exactly what was the ground of its action.

The statute under which it was proceeding provides: "That it shall be the duty of the Public Service Commission of Maryland, upon the application of any motor vehicle owner for a permit to operate any motor vehicle for the public transportation of merchandise or freight over any specified route to investigate the expediency of granting said permit, the number of motor vehicles to be used, and the rate to be charged, and if, in the judgment of the Public Service Commission it is deemed best for the public welfare and convenience that said permit should be granted, said Public Service Commission is hereby empowered and authorized to grant such permit subject to such conditions and terms and for such duration of time, not exceeding the period of twenty years, as it may deem advisable. But if said Public Service Commission deems the granting of such permit prejudicial to the welfare and convenience of the public, then the said Public Service Commission is hereby empowered and authorized to refuse the granting of same."

This phraseology seems to me to authorize a consideration of the additional burden on the road and on road traffic. Indeed, those questions would seem to be such obviously pressing ones in any full

consideration of a proposal to establish a new motor truck service, such an unavoidable part of the actual problem presented, that we must presume an intention to have them considered by the Commission unless the words of the statute clearly prevent it.

So the Public Utilities Commission of Rhode Island, in withholding approval of the establishment of a jitney bus service along a specified route, said (Public Util. Rep. 1922, E 612):

"We have also considered the problem presented by reason of the comparatively narrow streets within streets within the cities through which many of the jitneys operate, and the constantly increasing [fol. 21] amount of traffic that is being thrown upon such main thoroughfares, by reason of the increasing number of privately owned automobiles, and the increasing use of motor trucks."

"We believe that public convenience and necessity require the transportation of passengers through these streets by as few separate vehicles as is reasonably possible. The operation of the jitney, especially during the rush hours, has a tendency to create congestion, and while transporting comparatively few passengers, contributes greatly to the delay of all other forms of traffic."

The Public Utilities Commission of Connecticut weighed similar consideration in the case of "Application of Perrett and Glenney," decided June 17, 1921, and quoted in the report of the Rhode Island decision above.

In addition to the difficulties considered in those two cases, others may be imagined easily. The bridges on the selected route may be too light. The road bed may be too narrow, or too weak. The floor of the bridge across the Susquehanna River, between Havre de Grace and Perryville is only thirteen feet wide, and if a carrier should select a route across that bridge, it would present a problem of some difficulty, which might, perhaps, be found prohibitive.

In so far as the Commission should refuse a permit to a proposed interstate carrier on any of these grounds; that is, on consideration of the burden to be added to the travelled way and to traffic on it, then I take it to be clear that it would be imposing proper local police regulations and that the incidental interference with interstate commerce would not invalidate the action.

Hendrick vs. Maryland, 235 U. S. 610.

This I understand to be conceded in argument. And so long as it appears possible that the action of the Commission may have been based on these permissible grounds, it would seem that no ground of complaint against that action because of interference with interstate commerce, is shown. And on this reasoning alone, I think, the demurrer to the present bill would have to be sustained. The case is one for decision on appeal, however, and perhaps, the greatest [fol. 22] usefulness of this court may lie in making a full report on all the arguments and the study made of the case. In the remaining part of the discussion, we have to deal, of course, with the refusal of the permit for the complainants' truck line only in so far

as it may have been based upon considerations of the effect on existing public service in that territory, and possible detriment to the public as a consequence.

The widespread adoption of statutory provisions for consideration of problems which arise from that source, shows beyond any question by a court that the problems exist, and need to be dealt with before the establishment of a new line of service. Several damaging effects have been found to result from unrestrained establishment of additional service, especially from the setting up of jitney bus lines.

The Federal Electric Railway Commission has reported (see Public Util. Rep. 1922 E, 620):

"Street railway service and jitney service cannot permanently exist and pay their own way in competition with each other. The public good requires permanency and continuity of service, which cannot be reasonably guaranteed by the numerous applicants for a certificate to operate a jitney. If such operation proves to be unremunerative and impractical, it may be discontinued at any time at the option of the holder of the certificate, but in the meantime the trolley may be driven into bankruptcy, dismantle its plant, and take up its tracks, and the general public be deprived of any reasonable form of transportation."

And speaking of the unrestricted development of bus lines along the highways in New York, the court said in Niagara Gorge Ry. Co. vs. Gaiser, 109 Misc. 38, 178 N. Y. Supp. 156:

"The amendment of 1915 had subjected the suburban railways of the state to much competition, resulting in what is generally known by communities to be practical bankruptcy, and almost universal applications for increases in fares; and undoubtedly in recognition of this situation, and of the inequity of permitting competing bus lines to use, without license fee or public service regulation, the highways and streets, for which in many instances the railroad companies had been required by the terms of their franchise, and under [fol. 23] the general railroad law, to pave, the law was restored to that of 1913, and the option was given to every village and town to bring itself within the provisions of the amended section requiring local consent and certificates of public convenience and necessity from the Public Service Commission."

The Public Utilities Commission of the District of Columbia, In re Washington Rapid Transit Company (see Pub. Ut. Rep. 1923 A, page ix), in denying an application for an extension of motor bus service held that the theory and intention of the Public Utilities Act was that the power or regulation be exercised for the protection of all of the patrons of the various companies, not only by establishing reasonable rates and adequate non-discriminatory service, but also by assuring the permanence and stability of such rates and services through the denial of any proposal on the part of companies themselves or any demand of any portion of the public that might jeopardize the situation.

The report and decisions from which these quotations have been made, were not concerned with freight service, or with competition by an interstate carrier on the roads, but the problems must be substantially the same in either case. And the fact that the motor truck line is content to confine its service to interstate carriage does not, of course, confine the detriment, if any, to existing and competing interstate service only; it may well be true, and probably will be, that the existing local service carried on in connection with interstate service, must suffer a like detriment.

It being demonstrated, as I think it is, that the addition of such a service as the complainant proposes on a selected route, needs to be regulated, and sometimes prohibited for the protection of the communities to be served, even though the new service be interstate purely, may the State government fill that need? The Federal government has not taken the subject over into its control by any legislation passed up to this time. No question is raised here as to the reasonableness of the State's action, if the Constitution of the United States leaves it any power to act at all upon the situation presented. A problem and a reasonable solution of it are to be assumed under the pleadings. And the only question is whether a state can apply a solution when interstate commerce is to be affected by it.

[fol. 24] In the case of Crutcher vs. Kentucky, 141 U. S. 58, the Supreme Court held invalid, because of unconstitutional interference with interstate commerce, an act of the Kentucky legislature passed "to regulate agencies of foreign express companies," and which required each agent to obtain a state license and file an affidavit that his company had at least $150,000 of capital. The court said, page 59: "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislature of that State. So with regard to manufacturing corporations."

In the case of Barrett, president of the Adams Express Co., vs. New York, 232 U. S. 14, and Platt, treasurer of the U. S. Express Co., vs. New York, 232 U. S. 35, the court held unconstitutional for the same reason ordinances of New York City which required vehicles same reason ordinances of New York City which required vehicles and drivers of the express companies to be licensed, and exacted bonds conditioned upon safe delivery of packages in the city. Justice Hughes, for the court said, page 31:

"It is insisted that, under the authority of the State, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly the exertion of the power essential to insure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. It must, however, be confined to matters which are appropriately of local concern. It must proceed

upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or treat it as a local privilege and prohibit its exercise in the absence of a local license. As was said by this Court in Crutcher vs. Kentucky, 141 U. S. 58: "A State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

And so, in Sault St. Marie vs. International Transit Co., 234 U. S. 333, it was held to be an unconstitutional regulation that re-[fol. 25] quired an international ferry to take out a license and pay a fee as a condition precedent to doing business. Justice Hughes here observed that if the State or city could make its consent necessary to the lawful conduct of a ferry it might withhold such consent and thereby forbid the commerce in which the ferry was engaged.

These decisions do not, of course, introduce any novel principles. They are only concrete applications of principles and distinctions expounded at length in many decisions of the Supreme Court. And, generally speaking, the principles are these:

The Federal power over any interstate commerce is exclusive in so far as Congress has assumed control over it by legislation.

It is also exclusive in such control or action with reference to interstate commerce as needs to be uniform throughout the country, even in the absence of any congressional legislation assuming that control. As to this, the presumption is that Congress intended the commerce to be free and uncontrolled.

It is suggested that there is a third kind of regulation in which the power of Congress is exclusive, and in which the States have no power under any circumstances—that by which direct burdens are imposed on interstate commerce. In the express company decisions just quoted (232 U. S. 31) Justice Hughes said: "It is insisted that under the authority of the State the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Again in the Minnesota rate cases, 230 U. S. 352, 396, the Court said: "If a State enactment imposes a direct burden upon interstate commerce it must fail regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates to be affected."

But these statements seem to be only varied expressions of the second principle stated above. Further in the opinion in the Min-[fol. 26] nesota state cases (230 U. S. 352) Justice Hughes said:

"It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of

diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting State legislation.

"The principle which determines this classification underlies the doctrine that the State cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

It must be borne in mind that in the case at bar we are not dealing with a prohibition of any and all entry into interstate commerce except under the State licenses or other exactions. That was the situation before the Supreme Court in each of the express company cases stated above; the direct burdens imposed on interstate commerce in those instances were requirements imposed on the mere doing of business anywhere under any circumstances in the State, or rather without reference to place or circumstances. This case is to be distinguished in that the action to be dealt with is the refusal of the State Commission to permit the carrier to establish a line on the particular route it has chosen along the roads of the State. It is only a particular restriction required for the protection of public welfare and convenience in the territory affected. The interference with interstate commerce which is involved in this is not direct in the sense of the express company decisions above; it is incidental to the solution of a real and important problem within the State, and seems to me to stand on the same footing as State quarantine laws, port regulations and the like, which, so long as they are reasonable solutions of local problems, are valid, despite the interference with interstate commerce involved.

Minnesota Rate Cases, 230 U. S. 352;
Robbins vs. Shelby Taxing District, 120 U. S. 489, 492.

[fol. 27] It seems to me clear enough without discussion that the protection of the supply of transportation in the territory affected presents a local problem. The regulation, or restraint is essentially a solution of a local problem, depending upon the facts peculiar to each locality in which it arises. Not only is it not a problem for which uniform, national regulation is especially appropriate, but the possibility of such national regulation is questionable. The conclusion from this argument is, of course, that the regulation or restraint, if reasonably necessary or desirable, may be made by the State government. And the reasonableness of the restraint in this instance is passed unquestioned as the case is presented.

There is another phase of this question which is suggested by some of the cases examined. Many statements are to be found to the effect that the use of a public highway by a carrier for hire is a special use of public property, over which a State has absolute power, and which it may prohibit in any one instance. In the case of

Ex Parte Dickey, 76 W. Va. 576, which seems to be the leading case on the subject now, the Court said:

"The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of the legislative power is that of regulation; but as to the latter, its power is broader, the right may be denied, or it may be permitted to some and denied to others because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

Schoenfeld vs. Seattle, 265 Fed. 726;
Nolen vs. Reichman, 225 Fed. 812;
State vs. Darazzo, 118 Atl. Rep. 81 (Conn. 1922).

None of these cases, and the authorities which they cite, discuss the refusal of a license for an interstate carrier on the roads. My own opinion is that, inasmuch as the utilizing of State roads for through traffic is still a comparatively new use, its full effects not yet perceptible, and its problems not yet fully developed, it would be better to defer the task of drawing the boundary line between the Federal power over interstate commerce and a State's power [fol. 28] over the roads which it builds and maintains. As it seems to me unnecessary to a decision in this case, I do not venture to do it now.

I have not agreed in the complainant's contention that the statutes of Maryland do not give the Public Service Commission power to control the establishment of a new line when the carrier is engaged in interstate commerce. The provisions of Section 4 of Chapter 401 of the Act of 1922, as has been seen, do not, standing alone, contain any restriction in this respect. It is true that the statute under which the commission was originally created (Acts 1910, Chap. 180) confined its operations to commerce within the State. But the Act of 1922, and its original in the Act of 1916, Chapter 714, were not passed as mere additions to the act creating the Public Service Commission; it was, as the preamble states, an act "relating to motor vehicles used in the public transportation of passengers for hire, and to motor vehicles used in the public transportation of merchandise or freight for hire, respectively, over State, State aid, improved county roads and streets and roads of incorporated towns and cities in the State of Maryland." This later act was apparently an adoption of a measure devised and found useful in other States. The State agency which is utilized for the issuance of the permit is not the same in all the States, but in all, I think, it is made a mere convenience for the effectuation of the purposes of the act, and of all of them. And so we must rather deduce the extent of the power given from the extent of the need which the new act was designed

to meet. In the problem to be solved there is no distinction coincident with that between interstate and intrastate commerce, and as it would obviously prevent a solution of the problem in many instances, I think we are compelled to assume, in the absence of express restriction, that the Legislature intended none.

That the remedy of injunction would be appropriate one in this case, if any remedy at all were allowable, seems to be decided in the case of Barrett, &c., vs. New York, 232 U. S. 14, and the cases there cited.

The demurrer to the bill of complaint is sustained for these reasons. Leave to amend the bill will, of course, be granted if the complainant concludes that the bill can be strengthened, or any legal difficulties avoided, by amendment.

Carroll T. Bond.

[fol. 29] IN CIRCUIT COURT OF BALTIMORE CITY

ORDER REFUSING PRELIMINARY INJUNCTION AND SUSTAINING THE DEMURRER OF THE DEFENDANT TO THE BILL OF COMPLAINT—Filed 7th February, 1923

The plaintiff in the above case having moved for a preliminary injunction and the defendant having interposed a demurrer to the bill of complaint filed in the case, and the said motion and demurrer having been set down for hearing on the 2nd day of January, 1923, at which time full argument upon said motion and upon said demurrer was heard, it is ordered by the Circuit Court of Baltimore City, this 7th day of February, 1923, that the said motion of the said plaintiff for a preliminary injunction be and it is hereby refused and the demurrer of the defendant to the bill of complaint be and it is hereby sustained, with leave to the plaintiff within ten days from the date of this order to amend its bill of complaint if it shall so desire, otherwise the said bill of complaint shall be dismissed.

Carroll T. Bond.

IN CIRCUIT COURT OF BALTIMORE CITY

PETITION OF THE PLAINTIFF FOR LEAVE TO AMEND ITS BILL OF COMPLAINT—Filed 7th February, 1923

The petition of George W. Bush & Sons Company respectfully shows unto your Honor:

That the defendants in this proceeding having filed a demurrer to the plaintiff's bill of complaint, and the same having been on the 7th day of February, 1923, sustained by this Court, with leave to the plaintiff to amend its said bill of complaint, the plaintiff in accordance with said permission so granted it, now prays the Court to permit it to amend the same by adding at the end of the fifth paragraph thereof the following by way of interlineation:

[fol. 30] The plaintiff further avers that the said motor trucks, which it proposed to use for the purposes of interstate transportation solely along the route and over the highways of the state mentioned in its said application to said Commission, comply in all respects with the laws of Maryland and the rules and regulations passed in pursuance thereof regulating the use of motor trucks upon and over the highways of Maryland, and are such as are commonly used and permitted to be used over and along said highways, and particularly over and upon the highways along the route mentioned in plaintiff's said application, and over and upon all of the bridges connecting said highways; that the purpose and intention of plaintiff to use only such motor trucks as complied in all respects with the laws of the State of Maryland and the rules and regulations passed in pursuance thereof fixing and determining the size, weight, tread and all other requirements specified in such laws, rules and regulations, was fully declared and made known to the said Commission at the time said application was made and at the time of the hearing thereon, and that said Commission passed its said order denying the said permit to the plaintiff with a full knowledge of the plaintiff's said purpose and intention; that the said Commission did not question and cannot question the fact that if said plaintiff were permitted to operate said motor trucks for the purpose aforesaid over and along the highways constituting the route mentioned in said plaintiff's application that the said plaintiff would carry out and fully comply with its intention and purpose so declared as aforesaid before said Commission.

And the plaintiff further avers that for a period of approximately eighteen months prior to the 10th day of November, 1922, it had operated motor trucks over the highways and the bridges along said highways constituting the route mentioned in said plaintiff's application for the purpose of transporting in interstate commerce solely, goods and merchandise for hire, having first obtained for said motor trucks and the drivers thereof the licenses required by the laws of the State of Maryland. That said motor trucks complied in all respects with the laws of the State of Maryland, being such as were permitted by said laws to be used upon the highways of said State and such as were and are now commonly and ordinarily used upon said highways. That the motor trucks mentioned in the plaintiff's said application and which it requested a permit to use for the purpose aforesaid over the route described in said application are of the same kind as those [fol. 31] which it had used during the said period of approximately eighteen months. The plaintiff used said motor trucks during said period of eighteen months in the belief that as they were employed in an interstate business solely the plaintiff was not required to obtain a permit from the Public Service Commission for the operations of said trucks in said business and that nothing further was required of the plaintiff in the premises than to obtain such licenses for the operation of said motor trucks as were required by the laws of the State of Maryland to be procured by any person or corporation who might likewise operate motor trucks of the same kind over said highways; that nevertheless as soon as said Public Service Commission informed plaintiff that it took a different view and ruled that plaintiff could not operate said motor trucks for the purpose aforesaid

without a permit from it, the said Public Service Commission, the plaintiff by reason of said notice and of the penalties, suits and prosecutions to which it might become subjected as a consequence of the further operation of the said motor trucks as aforesaid, thereupon ceased and desisted from further operating the same.

That the highways mentioned in plaintiff's said application to said Commission, constituting the route along which plaintiff asked the permission of said Commission to operate said motor trucks for the transportation of goods and merchandise in interstate commerce solely, are of the same general character of construction as all other public highways of the State of Maryland, and over which motor trucks of the kind plaintiff asked permission to operate as aforesaid are permitted to travel without restriction by law or any rule or regulation passed in pursuance thereof, except in so far as any valid restriction may be imposed by or under the authority of said Act of 1922, Chapter 401, Section 4. That the operation of said motor trucks over said highways and the bridges along the same by plaintiff for the transportation of goods and merchandise for hire in interstate commerce solely will impose no different burden upon said highways and the bridges along the same than the operation of motor trucks of the same kind and character by private persons or corporations, which said use of said highways and bridges by said private persons and corporations is now freely permitted by the State of Maryland.

That at the hearing aforesaid upon said plaintiff's application to the said Public Service Commission for the said permit, testimony was taken only upon the question as to whether or not the operation [fol. 32] of plaintiff's motor trucks for the purpose and in the manner aforesaid would be detrimental to the public interest in the sense of benefiting or prejudicing the public with respect to the matter of public transportation, that is to say whether or not existing lines of transportation would be benefited or prejudiced and in this way the public interest affected. That no testimony was taken and no point was made whatever by the Commission at said hearing with respect to any damage or injury to the highways or bridges along the route upon which plaintiff desired to operate its motor trucks in the manner and for the purpose aforesaid, nor with reference to whether or not the granting of said permit to the plaintiff would in any way interfere with the convenience of the public travel along said highways or over said bridges. Plaintiff further avers that as a matter of fact the operation of its said motor trucks for the purpose and in the manner aforesaid would not in fact cause any damage or injury to said highways and bridges other than the operation of the same kind of motor trucks by private persons or corporations, which is now freely permitted along said highways. That said highways are not in fact over crowded or unduly congested and that all of the bridges along said highways constituting the route mentioned in plaintiff's application are constructed so as to permit travel of heavier burden than that which will be imposed upon them by the use of the plaintiff's motor trucks for the purposes aforesaid.

And is in duty bound, &c.

Marbury, Gosnell & Williams, Solicitors for Plaintiff.

[fol. 33] Jurat showing the foregoing was duly sworn to by Henry T. Bush omitted in printing.

IN CIRCUIT COURT OF BALTIMORE CITY

ORDER AMENDING BILL OF COMPLAINT

The foregoing petition having been read and considered by the Court, it is ordered this 7th day of February, 1923, by the Circuit Court of Baltimore City that the plaintiff be granted leave to amend its bill of complaint as prayed in said petition, and that said bill of complaint shall be deemed and taken as amended accordingly.

Carroll T. Bond.

IN THE CIRCUIT COURT OF BALTIMORE CITY

DEMURRER—Filed 14th February, 1923

To the Honorable the Judge of said Court:

The defendant, the Public Service Commission of Maryland, demurs to the whole bill of complaint, as amended, filed against it in this case, and assigns as special grounds of said demurrer:

1. That the plaintiff has not stated in its bill of complaint, as amended, such a case as entitles it — any relief in a Court of Equity.

2. That this Court has no jurisdiction to hear and determine the questions raised and presented by the bill of complant as amended.

[fol. 34] 3. That this Court has no jurisdiction to grant the relief prayed for in the bill of complaint as amended.

4. That the order of this defendant, No. 7192, passed December 20th, 1922, a copy of which, marked "Plaintiff's Exhibit B," was filed as a part of the bill, is a proper and valid order, and was passed by this defendant in the exercise of the police power of the State, vested in it in relation to a subject over which this defendant had full constitutional powers.

5. That the plaintiff has no right to operate over the highways of the State of Maryland motor trucks of the kind and for the purpose stated in the bill of complaint, as amended, without the authority or permission of the State of Maryland, conferred or granted by this defendant.

As in duty bound, etc.

William M. Maloy, J. Frank Harper, Ezra B. Whitman, Constituting the Public Service Commission of Maryland. N. Charles Burke, General Counsel of the Public Service Commission of Maryland.

(Affidavit attached.)

In Circuit Court of Baltimore City

Motion to Grant Preliminary Injunction.—Filed 27th February, 1923

The plaintiff in the above entitled cases moves the Court to grant a preliminary injunction as prayed in the bill of complaint as amended.

George Weems Williams, William L. Rawls, Attorneys for Plaintiff.

[fol. 35] In the Circuit Court of Baltimore City

Final Order and Decree Dismissing Bill of Complaint—Filed 27th February, 1923

The defendant having demurred to the bill of complaint as amended in the above entitled case and the said demurrer, together with plaintiff's motion for a preliminary injunction having been set down for hearing on this day, and both parties having been heard thereon, and the plaintiff declining to make further amendment, it is ordered by the Circuit Court of Baltimore City, this 27th day of February, 1923, that the said demurrer be and it is hereby sustained and the said motion of the plaintiff for a preliminary injunction be and it is hereby refused, and it is further ordered and decreed that the said bill of complaint be and it is hereby dismissed with costs to the defendants.

Carroll T. Bond.

In the Circuit Court of Baltimore City

Order of Appeal—Filed 27th February, 1923

Mr. Clerk: Please enter an appeal on behalf of plaintiff, George W. Bush & Sons Company, from the order and decree passed on the 27th day of February, 1923, to the Court of Appeals of Maryland.

George Weems Williams, William L. Rawls, Solicitors for Appellant.

State of Maryland,
Baltimore City, To wit:

I hereby certify that on this 27th day of February, 1923, before me, the subscriber, clerk of the Circuit Court of Baltimore City, personally appeared William L. Rawls, solicitor for plaintiff, and made [fol. 36] oath in due form of law on behalf of the plaintiff that this appeal is not made for the purpose of delay.

Chas. R. Whiteford, Clerk of the Circuit Court of Baltimore City.

Which said appeal being by the Court here also granted, it is thereupon ordered by the Court here, that a transcript of the record of proceedings in the cause aforesaid be transmitted to the Court of Appeals of Maryland, under the rules thereof, and the same is transmitted accordingly.

Test: Chas. R. Whiteford, Clerk.

IN THE CIRCUIT COURT OF BALTIMORE CITY

CLERK'S CERTIFICATE

In testimony that the aforegoing is truly taken from the record and proceedings of the Circuit Court of Baltimore City, in the therein entitled cause, I hereunto set my hand and affix the seal of the Circuit Court of Baltimore City aforesaid this 2nd day of March, A. D. 1923.

Chas. R. Whiteford, Clerk of the Circuit Court of Baltimore City. (Seal.)

[fol. 37] IN THE COURT OF APPEALS OF MD.

[Title omitted]

OPINION OF THE COURT—Filed June 26, 1923

Judge PATTISON delivered the opinion of the Court:

The appeal in this case is from an order of the Circuit Court of Baltimore City, passed on the 27th day of February, 1923, sustaining a demurrer to, and dismissing the amended bill of the appellant Geo. W. Bush & Sons Company, a corporation organized under the Laws of the State of Delaware, against the appellees, who constitute The Public Service Commission of Maryland.

The facts alleged in the bill are substantially as follows: The plaintiff at the time of and prior to the filing of the bill, was operating, as a common carrier, a line of steamboats on the Delaware River for the transportation, for hire, of goods, merchandise and other properties, between the Cities of Philadelphia and Wilmington, and for a period approximately 18 months before the tenth day of November, 1922, it was also operating a line of motor trucks in the transportation, for hire, of goods and merchandise and other property, from points in Maryland to Wilmington and other points in Delaware, connecting with its line of steamboats upon the Delaware River.

While so operating its truck line, it was prior to the tenth day of November, 1922, notified by The Public Service Commission of Maryland, that it would be required to file an application with, and obtain from the Commission, permits before it could lawfully operate

[fol. 38] its truck lines in Maryland, over the routes upon which it was then operating.

The plaintiff on the 20th day of August, 1922, filed its application in the prescribed form, with the Commission, asking for permits to operate motor vehicles over State, State aid, improved County roads and streets and roads of incorporated towns or cities in the State of Maryland, in the public transportation of merchandise of freight over specified routes between Chestertown, Maryland and the Maryland-Delaware State line by way of Elkton, between Providence, Maryland, the Maryland-Delaware State line by way of Elkton, and between Havre de Grace, Maryland, and the Maryland-Delaware State line by way of Elkton, with the declared intention and purpose of extending the operation of its motor vehicles through and beyond the said Maryland-Delaware State line to Wilmington and other points in the State of Delaware. The Commission set the application down for hearing on the 29th day of November, 1922. On that day evidence was heard in respect to the facts contained in the application, and in said hearing the plaintiff asked that its application be deemed by the Commission as asking for permits to operate said lines of motor trucks, for the purpose already stated, between points in Maryland and points in Delaware in the doing of both an interstate and an intrastate business, as well as permits to operate said lines doing and interstate business solely, which request, as alleged in the Bill, was granted by the Commission.

The plaintiff at the time, also made known to the Commission that if the permits were granted to it to do an interstate business solely, it would take out and pay for all licenses and comply in all respects with the Statutes of the State, or any rule or regulation prescribed in respect thereto, by any agency or instrumentality of the State.

The Commission refused the permits asked for and in the order [fol. 39] refusing them, passed on the 20th day of February, 1922, declared "that the public welfare and convenience do not require the granting of the permits for which applications have been made, as aforesaid, by the said The George W. Bush & Sons Co., but that on the contrary that the granting of such permits would be prejudicial to the welfare and convenience of the public."

The bill alleged the appellant's solvency, ability and willingness to operate its trucks in compliance with the law, and the rules and regulations of the Commission passed and made in respect thereto.

The appellant further alleged, that it was entitled to the permits asked for and that the operation of the trucks would not cause any damage or injury to the highways and bridges, other than that caused by the same kind of motor trucks which were permitted to be used, and were used thereon by others. They said the highways were not overcrowded, nor unduly congested, and that all the bridges on the highways mentioned in the application, are so constructed as to permit the use, over them, of heavier trucks than those used by the plaintiff.

The bill asked for an injunction restraining the Commission from enforcing against the plaintiff or from prosecuting it for or on account of any alleged violation of the law or any order of the Commis-

sion prohibiting the operation by it of said motor trucks in the manner stated in the appellant's applications.

A demurrer filed to the amended bill of the Commission was by an order of the Court sustained, and the bill dismissed. It was from that Order, as we have already said, that this appeal was taken.

The Commission in its refusal to grant the permits asked for by the appellant, was governed and controlled by its construction of the Act of 1916, Chapter 714, Sec. 4, as amended by Sec. 4, of Chap. 40 of the Act of 1922, which is as follows:

"That it shall be the duty of the Public Service Commission of Maryland, upon the application of any motor vehicle owner for a permit to operate any motor vehicle for the public transportation of [fol. 40] merchandise or freight over any specified route to investigate the expediency of granting said permit, the number of motor vehicles to be used, and the rate to be charged, and if, in the judgment of the Public Service Commission, it is deemed best for the public welfare and convenience that said permit should be granted, said Public Service Commission is hereby empowered and authorized to grant such permit subject to such conditions and terms and for such duration of time, not exceeding the period of twenty years, as it may deem advisable. But, if said Public Service Commission deems the granting of such permit prejudicial to the welfare and convenience of the public, then the said Public Service Commission is hereby empowered and authorized to refuse the granting of same. The said Public Service Commission of Maryland is further empowered and authorized to make such rules and regulations as it may deem necessary to govern the control and operation of same, and enforce same by such penalties, or forfeitures, as it may prescribe, including the revocation of the permit granted under the provisions of this Act."

The Act in terms, empowered and authorized the Commission to refuse the granting of the permits asked for by the appellant, if it deemed the granting of them was prejudicial to the welfare or convenience of the public.

The first contention of the appellant is that it was never intended by the legislature of this State that said Sec. 4, of the Statute should apply to the operation of motor trucks over routes between points in this State and points in another State. There is certainly nothing in the wording of the Statute to indicate that it was the legislative intent to exclude such routes from its provisions, and unless it be found that the inclusion of them within the Statute will be in conflict with the Federal Constitution or some Federal Statute passed pursuant thereto, the Statute of this State should be held to apply to them; and this question is involved in the second contention of the appellee that the legislature of this State has no right to enact any law making the procurement of a permit necessary, before any person, firm or corporation, may lawfully operate a motor truck line between points in this State and points in some other state, because in so doing the Act would be in violation of Art. 1, Sec. 8, Clause

3, of the Federal Constitution under which the power "to regulate commerce among the several States" was, by the states, delegated to the Federal Government.

[fol. 41] There have been many cases arising under the above provision known as the Commerce Clause of the Federal Constitution, and a number of them have been cited by the appellant in support of its contention.

The two that it seems chiefly to rely upon are Crutcher v. Kentucky, 141 U. S. page 47; Adams Express Co. v. New York, 232 U. S. page 14.

In the first of these cases (Crutcher v. Kentucky) an Act of the Legislature of Kentucky provided that an agent of an express company not incorporated under the laws of that State, should not carry on business therein, without first obtaining a license from the State and that such agents should before obtaining such license, satisfy the auditor of the State, that the company represented by him had an actual capital of at least the amount named therein, and if he engaged in business without obtaining a license, he was subject to the payment of a fine. The Supreme Court in that case held the Act was unconstitutional, as it was found to be in violation of the provision above mentioned.

In the Adams Express Co. case an ordinance of the City of New York required an express company to obtain a local license as a condition precedent to its conducting, within the City, its interstate business. This ordinance like the Kentucky statute, was declared unconstitutional in that it required a party to take out a license for carrying on interstate commerce in conflict with the Commerce Clause of the Constitution.

In these cases there was an attempt to prohibit persons from engaging in the classes of business therein mentioned until they had first paid the direct license or tax imposed upon them. The requirement of the Act here under consideration is, that those wishing to use the roads and highways mentioned in their application for the public transportation of merchandise or freight, shall first obtain a permit from the Public Service Commission of the State. Neither the Statute nor the order appealed from imposes [fol. 42] any burden or restriction, directly or indirectly, upon the plaintiff's right to engage in interstate commerce.

As stated in the brief of the appellee, "the State, at the cost of many million dollars to the taxpayers, has established a fine system of improved public highways, and is expending millions more in the extension, improvement, and maintenance of this system."

The public highways over which the appellant seeks to operate its motor trucks, as instrumentalities of interstate commerce, were either built by or owned by the State, or the counties traversed by them.

It was the duty of the Commission under the Statute upon the receipt of the appellant's application for permits to operate the motor truck lines named in the application "to investigate the expendiency of granting said permits, the number of the motor vehicles to be used and the rate to be charged," but as stated by the Statute, if

the Commission deemed the granting of such permits prejudicial to the welfare and convenience of the public, they were not only empowered and authorized to refuse the granting of the permits, but it was their duty to do so.

A statutory regulation of this character is essential not only to the protection of the above mentioned highways built at great expense to the State and Counties, but also to the safety of the public who travel upon them.

The roads and highways are subject to great damage and injury when used by very large motor vehicles equipped without regard to the effect their use will have upon the roads; and of course the injury or damage is greater when large numbers of them are operated thereon, consequently the number of them used for profit and gain in the transportation of freight or passengers should be restricted to the public need or convenience and when the number is in excess thereof, their use becomes prejudicial to the welfare and convenience of the public.

[fol. 43] The operation of motor trucks upon these highways in most if not in all cases is a great convenience to the public, especially to those persons living along the route on which they are operated. It is therefore important that the use of the highways shall be so regulated as to assure the enjoyment of this right to the public, which right may be seriously affected by the failure of those to whom the privilege is granted to give proper service, caused by their inability to operate with a profit, resulting from the excessive number to whom such privilege is granted.

The object and purpose of the act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads.

It is admitted that Congress has enacted no legislation undertaking to regulate the instrumentalities here involved for carrying on interstate commerce, and thus it would seem that this case falls within the class of cases which are controlled by the principles enunciated in the Minnesota Rate Cases, 230 U. S. 352. In those cases Mr. Justice Hughes, in speaking for the Court said:

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation the power of Congress is [fol. 44] exclusive. In other matters, admitting of diversity of

treatment according to the special (400) requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.

"The principle, which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restrictions save as it is governed in the manner that the national legislature constitutionally ordains.

"Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it.

"They have no power to prohibit interstate trade in legitimate articles of commerce; or to discriminate against the products of other States; or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on, or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection.

"But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the consti- [fol. 45] tutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maint*a*ned in its full scope without un*n*ecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unre-

strained will of individuals (403) because Congress has not acted, although it may have such relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to [fol. 46] its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

To shorten this opinion we have omitted from the above decision the great numbers of cases cited in support of the principles therein stated.

If the contention of the appellant be correct, that the attempted regulation of the use of the highways of this State by the Public Service Commission under the statute mentioned is unconstitutional and void when applied to the appellant and others who apply for permits to engage in the transportation of freight and merchandise from points in this State to points in some other state, then there are no regulations of the use of the highways nor can there be any until Congress sees fit to pass them, and this it may never do. If it does not these valuable highways of the State will be subject to the use of motor vehicles of all sizes and character by the persons mentioned. This should not be, and, in our opinion, is not the law. But as we have said, this case is controlled by the principles laid down in the Minnesota Rate cases, and until Congress passes some legislation regulating the use of said highways, by the instrumentalities here mentioned, the right to do so, within the limitations mentioned in those cases, is lodged with the legislature of this State.

This precise question has not been before this or any other Court so far as we are informed, though it has been disposed of adversely to the contention of the appellant by the Public Service Commissions of the State- of Pennsylvania and New York in the cases of Chambersburg v. Hardman Public Utilities Report, 1921-C, 628; and in re Engelke v. Public Utilities Report, 1922-C, 71.

As we find no error in the Court's ruling in sustaining the demurrer to the bill and in dismissing it, we will affirm the order appealed [fol. 47] from.

Order affirmed with costs.

[File endorsement omitted.]

IN COURT OF APPEALS OF MARYLAND

JUDGMENT

Whereupon the following judgment of the Court was entered, to wit:

1923, June 26th.—Order affirmed with costs. Opinion by Pattison, J.

COURT OF APPEALS OF MARYLAND

[Title omitted]

DECREE—Filed June 26, 1923

The appeal in the above case standing ready for hearing, was argued by counsel for the respective parties, and the proceedings have since been considered by the Court.

It is thereupon, this 26th day of June, 1923, by the Court of Appeals of Maryland, and by the authority thereof, adjudged and ordered that the order of the Circuit Court of Baltimore City, dated February 27, 1923, be and the same is hereby affirmed, with costs.

A. Hunter Boyd, John P. Briscoe, Wm. H. Thomas, Jno. R. Pattison, Hammond Urner, T. Scott Offutt.

[File endorsement omitted.]

[fol. 48] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Sept. 19, 1923

To the Honorable A. Hunter Boyd, Chief Judge of the Court:

The Petition of George W. Bush & Sons Company, a body corporate, appellant in the above entitled case, respectfully shows unto your Honor:

1. That on the 26th day of June, 1923, a final judgment and decree was duly entered by the Court of Appeals of Maryland affirming the final order, judgment and decree entered by the Circuit Court of Baltimore City in the matter of a proceeding wherein said George W. Bush & Sons Company was the plaintiff and the said William M. Maloy, J. Frank Harper and Ezra B. Whitman, constituting the Public Service Commission of Maryland, were defendants, which final order, judgment and decree of the Circuit Court of Baltimore City was rendered on the 27th day of February, 1923, dismissing the bill of complaint of the said plaintiff and refusing the motion of said plaintiff for a preliminary injunction against said defendants to pro-

hibit them from enforcing and carrying out an order of said defendants acting as the Public Service Commission of Maryland, passed on the 21st day of December, 1922, insofar as the same related to the interstate transportation in which plaintiff proposed to engage as set forth in its said bill of complaint.

[fol. 49] 2. That in said bill of complaint filed by said plaintiff against the said William M. Maloy, J. Frank Harper and Ezra B. Whitman, constituting the Public Service Commission of Maryland, it was alleged that the said plaintiff had applied to said Public Service Commission for a license to operate motor trucks between points in the State of Maryland and points in the State of Delaware, said motor trucks to engage in the transportation for hire of goods, commodities and merchandise in interstate commerce solely, and it was further alleged that said Public Service Commission acting under the alleged authority of an Act of the General Assembly of Maryland, namely Section 4 of Chapter 714 of the Acts of the General Assembly of Maryland, Session of 1916, as amended by Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland, Session of 1922, had refused said permit and had threatened said plaintiff with the enforcement of certain heavy and disasterous penalties against it should it thereafter engage in the operation of said motor trucks between points in the State of Maryland and points in the State of Delaware for the transportation for hire of goods, commodities and merchandise in interstate commerce solely. Said bill of complaint prayed for an injunction against said defendants constituting the Public Service Commission of Maryland enjoining and restraining them from in any manner enforcing or attempting to enforce, or causing to be enforced against the plaintiff, its officers, agents, servants or employees, or any of them, any pains, penalties or forfeitures or from prosecuting or causing to be prosecuted, the plaintiff, its officers, agents, servants or employees, or any of them, for or on account of any alleged violation of law or any order of said Commission, provided such alleged violation should consist solely in the operation of a line of motor trucks between points in the State of Maryland and points in the State of Delaware, carrying goods, merchandise or other property for hire in interstate com-[fol. 50] merce solely without a permit from said Public Service Commission of Maryland. The allegations of said bill of complaint specifically charged that said Act of the General Assembly of Maryland, under the authority of which said defendants claim to act, was in violation of the Constitution of the United States and particularly Clause 3 of Section 8 of the First Article thereof, wherein it is provided that the Congress of the United States shall have power to regulate commerce with foreign nations, among the several States and with the Indian tribes. The said bill of complaint further charged that the action of said Public Service Commission in refusing to permit the plaintiff to operate a line of motor trucks between points in the State of Maryland and points in the State of Delaware for the transportation for hire of goods, merchandise and other property in interstate commerce solely, and in threatening to prosecute the said plain-

tiff, its officers, agents and employees for and on account of said operation, in the manner aforesaid, of said line of motor trucks, deprived the plaintiff of a right guaranteed and secured to it by the Constitution of the United States. That plaintiff also moved for a preliminary injunction against said defendants and on the 27th day of December, 1922, the defendants filed a demurrer to plaintiff's said bill of complaint, alleging as grounds for demurrer that the said Circuit Court of Baltimore City had no jurisdiction to hear and determine the questions raised and presented by the bill of complaint; that the said Court had no jurisdiction to grant the relief prayed therein and that the order of said defendants passed December 21st, 1922, was a proper and valid order passed by said defendants in the exercise of the police power of the State vested in them in relation to a subject over which said defendants had full constitutional powers. It was alleged as a further ground of demurrer that the plaintiff had no right to operate over the highways of the State of Maryland motor trucks of the kind and for the purpose stated in [fol. 51] the bill of complaint, without the authority or permission of the State of Maryland conferred or granted by the said Public Service Commission of Maryland. Said demurrer coming on for hearing before said Circuit Court of Baltimore City on the 22nd day of January, 1923, and both the plaintiff and the defendants being heard, the said Court thereafter, on the 7th day of February, 1923, ordered that the motion of said plaintiff for a preliminary injunction be refused and that the demurrer of the defendant to the bill of complaint be sustained with leave to the plaintiff within ten days from said 7th day of February, 1923, to amend its bill of complaint, if it should so desire, otherwise the said bill of complaint to be dismissed. Thereafter, the said plaintiff, by leave of the Court first had and obtained, filed an amendment by interlineation to the said bill of complaint, wherein it was in effect alleged that the motor trucks which defendants desired to operate between points in the State of Maryland and points in the State of Delaware, for the transportation for hire of goods, merchandise and other property in interstate commerce solely were of the same kind, nature and description as those which were permitted to be operated under the laws of the State of Maryland, and were such as were freely and commonly operated by other persons over and along its public highways, and that the operation of said motor trucks in the manner and for the purpose aforesaid over said highways and over the bridges along the same, would impose no different or greater burden upon them, than the operation of motor trucks of the same kind, character and description by private persons or corporations. That plaintiff had offered and would comply with all laws, rules and regulations of the State of Maryland respecting the operation of motor trucks in the manner and for the purpose aforesaid if it were permitted to engage in the business of transporting goods, wares and merchandise by such means between points in the State of Maryland and points in the [fol. 52] State of Delaware in interstate commerce solely. Thereafter, to wit on the 14th day of February, 1923, the defendants interposed a demurrer to the bill of complaint of the plaintiff, as amended as

aforesaid, wherein it was alleged as a ground of demurrer that the plaintiff had not stated in its bill of complaint as amended such a case as to entitle it to relief in a court of equity; that the Circuit Court of Baltimore City had no jurisdiction to hear, or determine the questions raised by the bill of complaint as amended; that the said court had no jurisdiction to grant the relief prayed for in the bill of complaint as amended; that the order of the said Public Service Commission of Maryland, passed December 21st, 1922, was a proper and valid order and was passed by the said Public Service Commission in the exercise of the police power of the State vested in it in relation to a subject over which said Commission had full constitutional powers; and as a further ground of a demurrer that the plaintiff had no right to operate over the highways of the State of Maryland trucks of a kind and for the purpose stated in the bill of complaint as amended without the authority or permission of the State of Maryland, conferred or granted by the said Public Service Commission of Maryland. The Plaintiff again moved for a preliminary injunction, and the said motion of the said plaintiff for a preliminary injunction and the said demurrer of the defendants to said bill of complaint as amended were duly set for hearing by the Court on the 27th day of February, 1923, upon which day after both parties were heard thereon, the said Court passed a final order and decree refusing the motion of plaintiff for a preliminary injunction, sustaining the demurrer of the defendants to the bill of complaint of the plaintiff as amended and finally dismissing the bill of complaint of the plaintiff with costs to the defendants. Whereupon the said plaintiff on the 27th day of February, 1923, filed its Order of Appeal to the Court of Appeals of Maryland, and said appeal being duly perfected came on to be heard in this Court at its January Term, 1923, and there-|fol. 53| after, namely on the 26th day of June, 1923, said Court of Appeals of Maryland rendered its opinion in said case holding that the provisions of Section 4 of Chapter 714 of the Acts of the General Assembly of Maryland, Session of 1916, as amended by Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland, Session of 1922, authorized said Commission to refuse to permit the plaintiff to establish a line of motor trucks for the transportation for hire of goods, wares and merchandise in interstate commerce solely between points in the State of Maryland and points in the State of Delaware, as set forth in the application of plaintiff made to said Public Service Commission of Maryland.

That accordingly on the 26th day of June, 1923, the order of said Circuit Court of Baltimore City finally dismissing the bill of complaint of the plaintiff as amended was affirmed by the said Court of Appeals of Maryland, with costs to the defendants.

That the constitutional validity of said Act of the General Assembly of Maryland should it be construed to authorize the said Public Service Commission of Maryland to prevent plaintiff from establishing a line of motor trucks to be operated between points in the State of Maryland and points in the State of Delaware for the transportation for hire of goods, merchandise and other property, was expressly raised by said plaintiff and determined against

it by both the said Circuit Court of Baltimore City and the said Court of Appeals of Maryland. That the right, power and authority of the said Public Service Commission of Maryland to interfere with, burden, or restrict the plaintiff's right to establish said line of motor trucks to be operated over the highways of Maryland between points in the State of Maryland and points in the State of Delaware, for the transportation for hire of goods, merchandise and other property in interstate commerce solely was expressly challenged and denied by [fol. 54] said plaintiff in its said bill of complaint filed in this case, and that the authority of said Public Service Commission of Maryland to so interfere with plaintiff was expressly adjudicated by the said Court of Appeals of Maryland.

3. That the said demurrer filed by defendants to the bill of complaint as amended presents the issues of law raised in the Court of Appeals, first as to the validity of Section 4 of Chapter 714 of the Acts of the General Assembly of Maryland, Session of 1916, as amended by Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland, Session of 1922, and as to the validity of the said order of the Public Service Commission of Maryland passed on the 21st day of December, 1922, the validity of each being disputed by the plaintiff as being in excess of the power of the State of Maryland to enact, or the said Public Service Commission to pass, insofar as the said Act or Order undertakes to burden, interfere with, regulate or prohibit the establishment or operation of a line of motor trucks between points in the State of Maryland and points in the State of Delaware for the transportation for hire of goods, merchandise or other property in interstate commerce solely, because the same are in conflict with Clause 3 of Section 8 of Article I of the Constitution of the United States, and work a deprivation of a right guaranteed and secured to the plaintiff by said Constitution of the United States.

4. That the judgment and order of the Court of Appeals of Maryland affirming the order and decree of the Circuit Court of Baltimore City, sustaining the demurrer of the defendants and finally dismissing the plaintiff's bill of complaint gives effect to said Section 4 of Chapter 714 of the Acts of the General Assembly of Maryland, Session of 1916, as amended by Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland, Session of 1922, [fol. 55] although the same is in conflict with the said Clause 3 of Section 8 of Article I of the Constitution of the United States, and deprives the plaintiff of his rights as a citizen of the United States as secured thereby.

5. That in the aforesaid judgment and order of the Court of Appeals of Maryland certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the Assignment of Errors, which is filed herewith.

Wherefore, your petitioner prays that the Writ of Error from the Supreme Court of the United States may issue in this case to the

Court of Appeals of Maryland, the highest court of the State of Maryland, wherein a decision in this case may be had for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Appeals of Maryland may be sent to the Supreme Court of the United States, as provided by rule.

Dated the 12th day of September, 1923.

George Weems Williams, William L. Rawls, Attorneys for Petitioners and Plaintiffs in Error.

[File endorsement omitted.]

[fol. 56] IN THE COURT OF APPEALS OF MARYLAND

[Title omitted]

ORDER ALLOWING WRIT OF ERROR, ETC.—Filed Sept. 19, 1923

On reading of the Petition of George W. Bush & Sons Company for Writ of Error and the Assignment of Errors, and upon due consideration of the record of said cause it is ordered that a Writ of Error be allowed from the Supreme Court of the United States to the Court of Appeals of Maryland, the highest Court of the State of Maryland in which a decision can be had, as prayed in said Petition, and that said Writ of Error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error do give security in the sum of $500, that said plaintiffs in error shall prosecute said Writ of Error to effect and if said plaintiffs in error fail to make their plea good shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said Writ of Error.

And the said plaintiff in error now presenting a bond in the sum of $500 with United States Fidelity and Guaranty Company as security, it is ordered that the same be and hereby is duly approved.

In witness whereof I have hereunto set my hand this 13th day of September, 1923.

[fol. 57] A. Hunter Boyd, Chief Judge of the Court of Appeals of Maryland, the highest Court of the State of Maryland.

[File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Sept. 19, 1923

Now comes George W. Bush & Sons Company, Petitioner and Plaintiff in Error, by George Weems Williams and William L. Rawls, its attorneys, and shows that in the record and proceedings and in the rendering of the judgment and decision of the Court of Appeals of Maryland, being the highest court in the State of Maryland, in which a decision could be had in the above entitled cause, manifest error has intervened to the prejudice of this Petitioner and Plaintiff in Error in the particulars following, to wit:

1. The Court of Appeals of Maryland erred in affirming by its order and judgment the action of the Circuit Court of Baltimore City in dismissing the Bill of Complaint as amended, of the Petitioner and Plaintiff in Error.

[fol. 58] 2. The Court of Appeals of Maryland erred in deciding by its final order and judgment in this case that section 4, chapter 714, of the Acts of the General Assembly of Maryland, session of 1916, as amended by section 4 of chapter 401, of the Acts of the General Assembly of Maryland, session of 1922, which it construed to authorize the Public Service Commission of Maryland, after full hearing or investigation and finding by that body, that the granting of the permit applied for by the plaintiff would be prejudicial to the welfare and convenience of the public, to deny a permit to the plaintiff to establish and operate for hire a line of motor trucks over State, State Aid, and improved county roads and streets of the incorporated towns and cities of the State of Maryland, between points in the State of Maryland and points in the State of Delaware, for the public transportation of merchandise or freight over any specified routes, was a valid law and not in conflict with the interstate commerce clause of the Constitution of the United States.

3. That the Court of Appeals of Maryland erred in affirming by its final order and judgment in this case, the action of the Public Service Commission of the State of Maryland in refusing a permit to the Plaintiff in Error for the operation of its motor trucks over State, State Aid, and improved county roads and streets of the incorporated towns and cities in the State of Maryland, between points in the State of Maryland and points in the State of Delaware, for the public transportation for hire of goods, merchandise and other property in interstate commerce solely, said Public Service Commission, before refusing the permit, after full hearing and finding by that body, that the granting of the permit applied for by the plaintiff would be prejudicial to the welfare and convenience of the public; the said trucks which the plaintiff asked permission to operate being of the same kind, character and description as those which are

[fol. 59] permitted to be operated upon the roads and highways of Maryland by the laws of said State, subject to the conditions and requirements specified in said laws, and the rules and regulations passed in pursuance thereof, and which are freely and commonly operated, subject to the provisions and requirements of the law, by persons and corporations upon and along said highways of said State, and particularly along the roads and highways mentioned in the plaintiff's said application to the said Public Service Commission of Maryland, and your petitioner offering to comply with all regulations applying to the operation of trucks over the roads of Maryland, and to take out and pay for all permits and licenses issued to the owners and drivers of trucks or motor vehicles under the laws of the State of Maryland.

4. That the Court of Appeals of Maryland erred in holding that the State of Maryland, or any agency created under the authority of the laws thereof, has the power or authority to require said plaintiff to obtain a permit from the State of Maryland or any of its agencies, in order to engage in the public transportation for hire of goods, merchandise or other property over State, State Aid, and improved county roads and streets and roads of incorporated towns or cities in the State of Maryland, between points in the State of Maryland and points in the State of Delaware, in interstate commerce solely, the said motor trucks which the plaintiff in Error desired to use, being of the same character and kind permitted by the laws of the State of Maryland, upon the Conditions and subject to the requirements therein specified, and the rules and regulations passed in pursuance thereof, to be used upon and over the highways of said state, and bridges along the same, and being commonly and generally used, subject to the provisions and requirements of the laws of the state, by persons and corporations upon said highways and over said [fols. 60 & 61] bridges.

By reason whereof this Petitioner and Plaintiff In Error prays that the said judgment and order of the Court of Appeals of Maryland may be reversed, annulled and held for nothing.

Dated this 12th day of September, 1923.

George Weems Williams, William L. Rawls, Attorneys for George W. Bush & Sons Company, Plaintiff in Error.

[File endorsement omitted.]

Bond on Writ of Error for $500—Approved and filed Sept. 19, 1923; omitted in printing

[fol. 62] WRIT OF ERROR—Filed Sept. 19, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the State of Maryland, before you or some of you, being the highest Court of Law or Equity of the said State in which a decision could be had in the said suit between George W. Bush & Sons Company, a corporation, Appellant, and William M. Maloy, J. Frank Harper and Ezra B. Whitman, constituting the Public Service Commission of Maryland, Appellees, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said George W. Bush & Sons Company, a corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to cor-
[fol. 63] rect that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 13th day of September, in the year of our Lord, one thousand, nine hundred and twenty-three.

Arthur L. Spamer, Clerk District Court of the United States for the District of Maryland. (Seal's Place.)

Allowed by A. Hunter Boyd, Chief Judge of the Court of Appeals of the State of Maryland.

[File endorsement omitted.]

CITATION—Filed Sept. 19, 1923; omitted in printing

[fol. 64] Service of copy of the within citation admitted this 17th day of September, A. D. 1923.

N. Charles Burke, General Counsel for the Public Service Commission of Maryland.

[File endorsement omitted.]

IN COURT OF APPEALS OF MARYLAND

[Title omitted]

STIPULATION FOR TRANSCRIPT OF RECORD—Filed Sept. 19, 1923

It is agreed by the counsel in this case that the record to be transmitted to the Supreme Court shall contain an entire record of the proceedings in the case in the Circuit Court of Baltimore City and in the Court of Appeals of Maryland; that is to say the record shall embrace the plaintiff's Bill of Complaint together with affidavit and exhibits thereto; motion of plaintiff for a preliminary injunction [fol. 65] and the order of court setting said motion for hearing, Demurrer of the defendants to Bill of Complaint; Opinion of the Circuit Court of Baltimore City delivered after the hearing on said motion and demurrer; Order of the said Circuit Court of Baltimore City, refusing a preliminary injunction and sustaining the demurrer of defendants to plaintiff's bill of Complaint; Petition of plaintiff for leave to amend Bill of Complaint as set forth in said petition; order of court granting plaintiff leave to amend as prayed; Demurrer of defendants to plaintiff's amended Bill of Complaint; Motion of plaintiff for a preliminary injunction; Final order and decree of the Circuit Court of Baltimore City sustaining the demurrer of defendants to plaintiff's Bill of Complaint, refusing a preliminary injunction and finally dismissing plaintiff's Bill of Complaint with costs; Plaintiff's order of appeal to the Court of Appeals of Maryland with Affidavit thereto; certificate of clerk of Circuit Court of Baltimore City to records and proceedings of said Circuit Court of Baltimore City in said cause; Opinion of the Court of Appeals of Maryland, and final order and decree of said court in pursuance of said opinion; Appellant's petition for Writ of Error, and Assignments of Errors, with order allowing said Writ of Error, Bond given by plaintiff in error; Writ of Error; Citation to defendants in error, with service thereon.

George Weems Williams, William L. Rawls, Attorneys for Plaintiff in Error. N. Charles Burke, Attorney for Defendants in Error.

[File endorsement omitted.]

[fol. 66] STATE OF MARYLAND, set:

CLERK'S CERTIFICATE

I, Luther H. Gadd, Clerk of the Court of Appeals of the State of Maryland, do hereby certify that the said Court is the highest Court in Law and Equity in said State in which a decision can be had.

I further certify that the aforegoing is a true transcript of record, opinion of the Court and judgment entered thereon, decree of the Court, petition for writ of Error, assignment of errors and order of Court thereon, bond with approval thereon endorsed, writ of error and order thereon, citation and service thereon, made up in accordance with the Stipulation of Counsel for the respective parties, and filed in said cause. And in obedience to the Commands of the within writ I now transmit said transcript of record, together with the original writ of error and the original citation in said cause to the Supreme Court of the United States.

In testimony whereof I hereunto subscribe my name and the Seal of the Court of Appeals affix-: this twenty-fifth day of September, nineteen hundred nd twenty-three.

Luther H. Gadd, Clerk of the Court of Appeals of Maryland.

[Seal of the Court of Appeals, Maryland.]

FILED
JAN 10 1925
WM. R. STANSBURY
CLERK

NO. 185. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

GEORGE W. BUSH & SONS COMPANY, PLAINTIFF IN ERROR,

v.

WILLIAM M. MALOY, J. FRANK HARPER AND EZRA B. WHITMAN, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND.

IN ERROR TO THE COURT OF APPEALS OF MARYLAND.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

GEORGE WEEMS WILLIAMS,

WILLIAM L. RAWLS,

Counsel for Plaintiff in Error.

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NO. 185. OCTOBER TERM, 1924.

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GEORGE W. BUSH & SONS COMPANY, PLAINTIFF IN ERROR,

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IN ERROR TO THE COURT OF APPEALS OF MARYLAND.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

The writ of error in this case to the Court of Appeals of Maryland brings up for review a decree of that court sustaining a demurrer to and finally dismissing a bill of complaint filed by plaintiff in error in the Circuit Court of Baltimore City, praying an injunction against the defendants, constituting the Public Service Commission of Maryland, to prohibit said Commission from interfering with the operation of plaintiff in error's motor trucks over certain of the public highways of the State on the route between points in the State of Delaware and points in the State of Maryland for the transporta-

tion of goods as a common carrier *in interstate commerce solely.* (Record, p. 32).

The bill alleged in substance the following facts: That for approximately eighteen (18) months prior to the 10th day of November, 1922, it had operated motor trucks as a common carrier for the transportation of goods in interstate commerce solely over the highways of the State of Maryland, constituting that part of its route or routes in the State of Maryland between Wilmington, Delaware, and Chestertown, Maryland, by way of Elkton, Maryland; between Wilmington, Delaware and Providence, Maryland, by way of Elkton; and between Wilmington, Delaware and Havre de Grace, Maryland, also by way of Elkton; that the motor trucks so used by it complied in all respects with the laws of the State of Maryland, being such as were permitted by said laws to be used upon the highways of the State, and such as were commonly and ordinarily used upon them. That plaintiff in error, before beginning the operation of these trucks, first obtained for them and their drivers the licenses required by the laws of Maryland.

Plaintiff in error had operated its trucks in the belief that as it was engaged solely in the transportation of goods in interstate commerce, it had done its full duty when it procured such licenses as any other person or corporation, using motor trucks of the same kind on the public highways of the State of Maryland, were required to take out and that it was not required to obtain a further permit from the Public Service Commission of

Maryland for their operation for said purpose (Record, p. 21.)

Plaintiff in error operates as a common carrier a line of steamboats upon the Delaware River for the transportation for hire of goods, merchandise and other property between the city of Wilmington, Delaware and the city of Philadelphia, Pennsylvania, and other cities upon the Delaware River, and the said line of motor trucks operated between points in Maryland and points in Delaware was established for the purpose of affording a connection between points in Maryland and points on the Delaware River upon the route of plaintiff in error's steamboat line.

On or about the 10th day of August, 1922, the plaintiff in error was informed by the said Public Service Commission, that it took a different view and contended that plaintiff in error could not operate its trucks, even though their use was limited to the transportation of goods in interstate commerce solely, without a permit from the Commission. (Record, pp. 21-22.)

Accordingly, in order to have the question at issue determined and to avoid the penalties, suits and prosecutions to which it might become subjected as a consequence of the further operation of the said motor trucks, it filed its application with the Commission for a permit to operate motor vehicles for public use as a common carrier of freight between the points in the State of Maryland and the points in the State of Delaware already mentioned. A duly certified copy of this application is

filed as Exhibit "A" with the bill of complaint (Record, pp. 6-8).

On November 24, 1922, the Commission passed an order fixing November 29, 1922 as the date for the hearing before it, respecting this application, and on that date plaintiff was present with its counsel and witnesses and produced testimony before said Commission respecting the matters and facts set forth in its application.

At this hearing the plaintiff in error specifically requested that its application should be deemed and taken as an application for permission to operate, as a common carrier, a line or lines of motor trucks to carry freight for hire between points in the State of Maryland and points in the State of Delaware, doing both an interstate and an intrastate business *and also as a separate and independent application for permission to operate as a common carrier a line of motor trucks to carry freight for hire between points in the State of Maryland and points in the State of Delaware, or states other than Maryland, doing an interstate business solely.* The Commission granted this request and the application was acted upon by it with that understanding, as appears from its order filed as Exhibit "B" to the bill of complaint. (Record, pp. 9-10.)

At the hearing, plaintiff in error undertook, in case a permit were granted to it by the Commission to do an interstate business solely, that it would take out and pay for all licenses and comply in all respects with the terms and provisions of any statute or statutes of the State of

Maryland or with any rules or regulations prescribed by any agency or instrumentality of the State, affecting or regulating trucks transporting freight between points of the State of Maryland on or over the highways thereof. It also appears from the order of the Commisison just referred to that it was passed notwithstanding this undertaking by plaintiff in error.

The complaint further avers that the motor trucks, which it proposed to use for the purpose of interstate transportation solely along the named routes over the highways of the State, mentioned in its application, complied in all respects with the laws of Maryland and the rules and regulations passed in pursuance thereof, fixing and determining the size weight and tread, and regulating the use of motor trucks upon and over said highways and were also such as were commonly used and permitted to be used over and along said highways and particularly over those along the routes mentioned in plaintiff's application, and over and upon the bridges connecting these highways; that this purpose and intention of plaintiff to use only trucks of such a character was fully declared and made known to the Commission at the time the application was made and at the time of the hearing thereon and that the order of the Commission was passed with a full knowledge of this purpose and intention on the part of plaintiff in error; that the Commission did not question and could not question the fact that if plaintiff in error were permitted to operate said motor trucks for the purpose named over the highways constituting the routes specified in the application, that the plaintiff in error would carry out and fully comply

with its intention and purpose so declared before the Commission. (Record, p. 21.)

It was further alleged that the operation of said trucks over the highways named in the application for the purpose specified would impose no different burden upon said highways than that imposed by the operation of trucks of the same kind and character by private persons or corporations, which said use of said highways by said private persons and corporations is fully permitted by the State of Maryland.

The bill of complaint recites that notwithstanding all of these facts, the Commission did on the 20th day of December, 1922, pass an order denying both applications of the plaintiff in error, that is the application to do an interstate and also an intrastate business and *the further and separate application to do an interstate business solely.* Thereupon the plaintiff in error filed its bill of complaint in the Circuit Court of Baltimore City, setting forth the facts substantially as above stated, praying for an injunction enjoining the said Commission from in any manner enforcing against the plaintiff, its officers, agents, etc., any pains or penalties or forfeitures or from prosecuting or causing to be prosecuted the plaintiff, its officers, agents, etc., for and on account of any alleged violation of law or any order of said Commission prohibiting such violation, which should consist solely in the operation of motor trucks or line of motor trucks between points in the State of Maryland and points in the State of Delaware, carrying goods, merchandise or other prop-

erty in interstate commerce only, without a permit from said Public Service Commission.

The plaintiff in error in its bill of complaint specifically and in terms challenged the validity of the action of the Public Service Commission in passing the order referred to, upon the ground that under the Constitution of the United States, plaintiff in error had the right to engage in said business of transporting freight by motor trucks in interstate commerce solely in the manner set forth in its bill of complaint, between the points in the State of Maryland and the State of Delaware, named therein, without any interference, hindrance or obstruction on the part of said Commission (Record, p. 4).

And it was further expressly averred (Record, p. 5) that,

> "By the action of said Commission in making the ruling and passing said order denying plaintiff the right to engage in interstate commerce in the manner aforesaid, that plaintiff was and is deprived of the right guaranteed to it by the Constitution of the United States, to freely engage in commerce between the several states of the United States and it hereby and herein expressly asserts and claims said right and avers that the action of said Commission is a denial and deprivation thereof, and is, therefore, in violation of the Constitution of the United States and utterly null and void".

A demurrer was interposed by the defendants to the bill of complaint (Record, p. 23) upon the grounds, among others, that the order of the Commission denying plaintiff in error's right to engage in interstate commerce solely, in the manner set forth therein, was a proper and

valid order and was passed in the exercise of the police power of the State vested in the Commission in relation to the subject matter thereof and that the plaintiff in error had no right to operate over the highways of the State of Maryland motor trucks of the kind and for the purpose stated in the bill of complaint, without the authority or permission of the State of Maryland. (Record, p. 23.)

On the 29th of February, 1923, the Circuit Court of Baltimore City, after a hearing on the demurrer, passed its final order and decree dismissing the bill of complaint and denying the relief therein prayed (Record, p. 24).

The opinion of the Circuit Court in ruling on the demurrer is set forth in the Record (pp. 12-23). An appeal was duly taken by the plaintiff in error from the action of the Circuit Court to the Court of Appeals of Maryland and the action of the lower Court was affirmed. (Record, p. 32.) The opinion of the Court of Appeals was delivered by Pattison, Judge (Record, pp. 25-31). Said Court of Appeals being the highest Court of Maryland, thereupon the case was brought to this Court by writ of error to the Court of Appeals of the State of Maryland.

SPECIFICATIONS OF ERROR.

These are as follows:

> "1. The Court of Appeals of Maryland erred in affirming by its order and judgment the action of the Circuit Court of Baltimore City in dismissing the Bill of Complaint as amended, of the Petitioner and Plaintiff in Error.

(Fol. 58) 2. The Court of Appeals of Maryland erred in deciding by its final order and judgment in this case that section 4, Chapter 714, of the Acts of the General Assembly of Maryland, session of 1916, as amended by Section 4 of Chapter 401, of the Acts of the General Assembly of Maryland, session of 1922, which it construed to authorize the Public Service Commission of Maryland, after full hearing or investigation and finding by that body, that the granting of the permit applied for by the plaintiff would be prejudicial to the welfare and convenience of the public, to deny a permit to the plaintiff to establish and operate for hire a line of motor trucks over State, State Aid, and improved county roads and streets of the incorporated towns and cities of the State of Maryland, between points in the State of Maryland and points in the State of Delaware for the public transportation of merchandise or freight over any specified routes, was a valid law and not in conflict with the interstate commerce clause of the Constitution of the United States.

3. That the Court of Appeals of Maryland erred in affirming by its final order and judgment in this case, the action of the Public Service Commission of the State of Maryland in refusing a permit to the Plaintiff in Error for the operation of its motor trucks over State, State Aid, and improved roads and streets of the incorporated towns and cities in the State of Maryland, between points in the State of Maryland and points in the State of Delaware for the public transportation for hire of goods, merchandise and other property in interstate commerce solely, said Public Service Commission, before refusing the permit, after full hearing and finding by that body, that the granting of the permit applied for by the plaintiff would be prejudicial to the welfare and convenience of the public; the said trucks, which the plaintiff asked permission to operate being of the same kind, character and description as those which are (fol. 59) permitted to be operated upon the roads and highways of Maryland by the laws of said State, subject to the conditions and re-

quirements specified in said laws, and the rules and regulations passed in pursuance thereof, and which are freely and commonly operated, subject to the provisions and requirements of the law, by persons and corporations upon and along said highways of said State, and particularly along the roads and highways mentioned in the plaintiff's said application to the said Public Service Commission of Maryland, and your petitioner offering to comply with all regulations applying to the operation of trucks over the roads of Maryland, and to take out and pay for all permits and licenses issued to the owners and drivers of trucks or motor vehicles under the laws of the State of Maryland.

4. That the Court of Appeals of Maryland erred in holding that the State of Maryland, or any agency created under the authority of the laws thereof, has the power or authority to require said plaintiff to obtain a permit from the State of Maryland or any of its agencies, in order to engage in the public transportation for hire of goods, merchandise or other property over State, State Aid, and improved county roads and streets and roads of incorporated towns or cities in the State of Maryland, between points in the State of Maryland and points in the State of Delaware, in interstate commerce solely, the said motor trucks which the plaintiff in Error desired to use, being of the same character and kind permitted by the laws of the State of Maryland, upon the Conditions and subject to the requirements thereto specified, and the rules and regulations passed in pursuance thereof, to be used upon and over the highways of said state, and bridges, along the same, and being commonly and generally used, subject to the provisions and requirements of the laws of the state, by persons and corporations upon said highways and over said (fols. 60 and 61) bridges." (Record, pp. 39-39.)

ARGUMENT.

It will appear from the aforegoing statement that the averments of the bill of complaint raised a single clear

cut and well defined question, namely, could the State of Maryland confer authority upon the Public Service Commission of the State, or any other agency to forbid the plaintiff in error under the circumstances alleged, from engaging in the business of transporting goods for hire over the highways of the State in interstate commerce only.

The plaintiff in error contends:

FIRST: THAT THE PROPRIETARY INTEREST OF THE STATE OF MARYLAND IN ITS HIGHWAYS GIVES IT NO POWER TO PROHIBIT THEIR USE FOR THE PURPOSE OF TRANSPORTING GOODS FOR HIRE IN INTERSTATE COMMERCE WHERE THE VEHICLES EMPLOYED ARE SUCH AS ARE FREELY PERMITTED BY THE STATE TO BE USED UPON SAID HIGHWAYS.

SECOND: THE FACT THAT CONGRESS HAS ENACTED NO LEGISLATION AFFECTING OR REGULATING INTERSTATE MOTOR TRANSPORTATION DOES NOT LEAVE THE STATES FREE TO PROHIBIT SAID TRANSPORTATION.

THIRD: THAT BY VIRTUE OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION, THE RIGHT TO ENGAGE IN INTERSTATE COMMERCE CANNOT BE DENIED BY ANY STATE AND THE QUESTION AS TO WHETHER OR NOT THE PUBLIC INTEREST WILL BE PROMOTED BY ANY LIMITATION UPON THIS RIGHT IS ONE EXCLUSIVELY FOR THE DETERMINATION OF CONGRESS.

I.

The facts surrounding the denial of the permit to the plaintiff in error to engage in interstate commerce were set forth in great detail in its bill of complaint, for the purpose of showing that the action of the State through its Public Service Commission was based solely upon the assumed right of the State to determine who should and

who should not engage in the business of public transportation over its highways in interstate commerce.

The highways which the plaintiff in error desired to traverse continue to the boundaries of the State and there join the highways of the State of Delaware. These highways of Maryland are thrown open to the unlimited use of the public employing vehicles complying with the State law except in so far as this right is limited with respect to common carriers by Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland of 1922, which will be examined in a moment.

It was under the authority of this statute that the Commission acted in refusing to grant the plaintiff in error a permit to engage in interstate transportation by motor truck over the highways of the State.

It is specifically alleged that at the hearing upon plaintiff's application, testimony was taken only upon the question as to whether or not the operation of plaintiff's motor trucks for the purpose and in the manner named, *would be detrimental to the public interests in the sense of benefiting or prejudicing the public with respect to the matter of public transportation, that is to say, whether or not existing lines of transportation would be benefited or prejudiced, and in this way the public interest affected,* and further that no testimony was taken and no point was made whatever by the Commission at the hearing with respect to any damage or injury to the highways or bridges along the route upon which plaintiff desired to operate its motor trucks, nor with reference to whether

or not the granting of said permit to the plaintiff would in any way interfere with the convenience of public travel along the highways (Record, p. 22).

It was further averred as a matter of fact, that the operation of the plaintiff in error's motor trucks for the purpose and in the manner mentioned would not in fact cause any damage or injury to said highways and bridges other than the operation of the same kind of motor trucks by private persons or corporations, which was freely permitted along said highways, and that the said highways were not in fact overcrowded or unduly congested, and that the bridges along them were constructed so as to permit travel of heavier burden than that which would be imposed upon them by the use of plaintiff's motor trucks (Record, p. 22).

By these and the other allegations already set forth it was made clearly to appear that the plaintiff had complied and stood ready to comply at all times with any and all regulations regarding the use of motor trucks over said highways, and with all requirements as to their weight, size and tread. There was thus excluded entirely from the case any question as to the right of the State to prescribe local police regulations for the protection of its highways and those traveling thereon and left only the narrow question as to its power to determine whether or not the highways should be used for the purpose of the transportation by motor trucks of goods for hire in interstate commerce solely.

This was the only question, which could remain open under the averments of the bill, for it has been seen that plaintiff made a separate and distinct request for a permit to engage in interstate transportation only and that the Commission in denying this application acted upon it as a separate and distinct matter (Record, pp. 9-11).

The action of the Public Service Commission must be taken, therefore, as asserting its power under the laws of the State to exclude from the exercise of the right of engaging in interstate commerce, a common carrier by motor truck, who proposes to use the highways of the State for that purpose solely.

The only difference in the character of the use which the plaintiff in error proposed to make of these highways, and that of all other persons who were freely permitted to use them, was in the nature of its business, and whether or not the State of Maryland has the power to confer authority on any of its agencies to prohibit motor trucks carrying goods for hire in interstate commerce, is the basic question involved in the case.

The statute above referred to, namely, the Act of the General Assembly of Maryland of 1922, Chapter 401, Section 4, under which the Public Service Commission claimed authority to prohibit the plaintiff in error from engaging in public transportation in interstate commerce, provides as follows:

> "Section 4. *And be it further enacted,* That it shall be the duty of the Public Service Commission of Maryland, upon the application of any motor vehicle owner for a permit to operate any motor

vehicle for the public transportation of merchandise or freight over any specified route to investigate the *expediency* of granting said permit, the number of motor vehicles to be used, and the rate to be charged, and if, in the judgment of the Public Service Commission, it is deemed best for the public welfare and convenience that said permit should be granted, said Public Service Commission is hereby empowered and authorized to grant such permit *subject to such conditions and terms and for such duration of time, not exceeding the period of twenty years*, as it may deem advisable. But, if said Public Service Commission deems the granting of such permit prejudicial to the welfare and convenience of the public, then the said Public Service Commission is hereby empowered and authorized to refuse the granting of same. The said Public Service Commission of Maryland is further empowered and authorized to make such rules and regulations as it may deem necessary to govern the control and operation of same, and enforce same by such penalties, or forfeitures, as it may prescribe, including the revocation of the permit granted under the provisions of this Act."

Plaintiff in error in its bill of complaint, as has been shown, attacked the validity of the order of the Public Service Commission, refusing it a permit and asserted that this order violated its right to engage in interstate commerce under the commerce clause of the Federal Constitution. This necessarily challenged the validity of any alleged law, which undertook to confer any such authority upon the Commission. Plaintiff in error contended that it was not the purpose of the Legislature of Maryland, by the Act mentioned, to confer any authority upon the Commission with respect to determining who should and who should not engage as a common carrier by motor truck over the roads of the State in inter-

state commerce solely, and, of course, denied the validity of the Act, if it should not be given such construction.

The Circuit Court of Baltimore City and the Court of Appeals of Maryland have construed the Act as conferring such authority and have sustained the action of the Commission thereunder, thus upholding the validity of the Act, in so far as it purported to operate upon interstate commerce.

The Court of Appeals sustained the validity of the statute as thus construed upon the ground of the asserted right of a State to protect by proper regulations its highways, built at its own expense, and that any such regulations were validly operative upon every one as local police measures until Congress should legislate respecting the use of the highways for interstate commerce in a different manner. It regarded as within the local police power of the State the authority to determine whether or not any person or corporation should engage in the business of a common carrier in interstate commerce, in so far as the use of the State highways was concerned.

It has already been pointed out that the averments of the bill of complaint excluded entirely from the case any question of a different use of the highways by the plaintiff in error from that of all other persons, except in so far as the nature of business it desired to engage in made it a different kind of use and consequently these averments render it impossible to justify the action of the Commission upon any ground relating to preservation or maintenance of the highways, or the policing of them.

Whatever may be the power of a State to forbid common carriers by motor truck engaged in purely internal or intrastate commerce from using the highways clearly an entirely different question is raised when this prohibition is attempted to be extended to carriers engaged in interstate commerce.

The contention that the ownership of the State roads confers any authority upon the State over carriers using such highways in the ordinary manner in interstate commerce has been repudiated by a number of decisions in this Court. The commerce clause of the Constitution would have been of little value if such a claim upon the part of the State had been upheld.

At the time of the adoption of the Constitution, the usual and ordinary, if not the only, means of transportation was by sailboat and horsedrawn vehicles. Unless vessels could use the waterways of the State and vehicles could use the highways of the State for the purpose of interstate communication, there could have been no such interstate commerce as was contemplated by the framers of the Constitution when power over it was delegated to the Federal Government. It was their purpose, of course, to release from local State regulation commerce among the several states and to make the country a unit in so far as that commerce was concerned.

In the great case of *Gibbons v. Ogden,* 9 Wheaton 1, this very question of the extent of the authority of a single state over commerce among the several states, by reason of its proprietary interest in its waterways, was considered by this Court.

The decision of the Court of Errors of New York in that case, 17 Johns. 488, which was reversed by this Court, was based upon an earlier decision of the Court of Errors of that State in *Livingston v. Van Ingen*, 9 Johns. 507, and it is a striking fact that exactly the same contention was made in the last named case in favor of the power of the State of New York to grant an exclusive privilege to navigate steamboats upon the waters of the State as is now made to support the power of the State of Maryland to determine what persons or corporations shall operate motor vehicles as common carriers over its highways in interstate commerce.

It is urged now *that the proprietary interest of the State in its highways*, gives it the right to exercise this power certainly at least until Congress shall itself legislate upon the subject. The ownership by the State of the roadbeds is claimed to invest the State with a peculiar and special authority with reference to limiting or prohibiting interstate commerce, which does not exist in the ordinary case of interstate intercourse.

This identical claim was asserted by the Court of Errors of New York in *Livingston v. Van Ingen, supra.* It was given the sanction of the great name of Chancellor Kent, who participated in the decision. He said, speaking of the validity of the exclusive grant, which had been given by the State (and which had been acquired by Robert R. Livingston) to operate steamboats upon the waters of the State for a period of years that,

> "The grant to the appellants may, then, be considered as taken subject to such future commercial

regulation as Congress may lawfully prescribe. Congress, indeed has not any direct jurisdiction over our interior commerce or waters. *Hudson* River is the property of the people of the state and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways or over the waters of any of our rivers or lakes. *They may, in their sound discretion, regulate and control, enlarge or abridge the use of its waters, and they are in the habitual exercise of that sovereign right*" (p. 579).

Mr. Justice Thompson in the same case said:

"The power of granting exclusive privileges upon land has not been in the least degree questioned, *and the same reasons both of principle and policy, will allow to the government the exercise of analogous powers upon the waters within the jurisdiction of the state.* No distinction appears to have been recognized in the practice of our government. Grants of land under water, the exclusive rights of ferriage, and the regulation of fisheries in the *Hudson* River, as well as canals, turnpike roads, *and the exclusive privileges of running stage wagons* have all been occasionally subjects of legislative bounty and provision" (p. 563).

It must be admitted, of course, that there is no conceivable distinction between the proprietary interest of the State in its navigable waters and its highways upon land. They are both within its territorial limits and it is the owner of them. But as the interstate commerce clause of the Constitution subjects the waterways of a state, which are channels of commerce among the states, to the uses of navigation for this purpose, so exactly in the same way it subjects its highways upon land to the use of interstate transportation.

It is not within the power of a state to deny this use in either case. They are both *means* of intercourse of the same fundamental character although one may be natural and the other artificial. Whether one or the other is a mere incident, not affecting the substantial nature of the instrumentality for the essential element is that both are and always have been a normal and accepted means of communication among the states.

The claim made by the Court of Errors of New York was finally and conclusively adjudicated adversely to it in the decision of this Court in *Gibbons v. Ogden, supra,* where Chief Justice Marshall used this language:

> "But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States; every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within a state.
>
> "This principle is, if possible, still more clear, when applied to commerce 'among the several states.' They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other states lie between them. What is commerce 'among' them; and how is it to be conducted? Can a trading expedition between two adjoining states, commence

and terminate outside of each? And if the trading intercourse be between two states remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the states must, of necessity, be commerce with the states. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a state. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore" (pp. 195, 196).

After this decision, it can scarcely be imagined that it would have been asserted that a stagecoach engaged in the transportation of passengers or goods among the states, would not have the right to use the highways of any state through which it might pass, upon the same terms and conditions upon which those highways were permitted to be used by other persons using vehicles of a similar character.

The fact that the vehicle is employed in public transportation can certainly not be regarded as changing the nature of the use of the highways. Such use by a carrier is but the ordinary and intended use of the highways and no state under the Constitution can be permitted to intervene and prohibit the free passage of such vehicle over its roads or highways where it is employed in interstate commerce. The business of such carriers is promotive of the very interstate commerce which it

was the purpose of the Constitution to protect from any adverse action on the part of any state.

The fact that the vehicles involved here are propelled by a different motive power from a horsedrawn vehicle, of course, makes no difference in their right to use the highways of a state, for one instrumentality of interstate intercourse is as much within the protection of the commerce clause of the Constitution as another. It is commerce among the several states that the Constitution contemplates and its protection extends to all of its instrumentalities, whether new or old.

In *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 9, 10, this Court said:

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. *They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth.* They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."

Again (p. 10):

> "The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all."

It is an unquestioned principle of law that the use of a highway, when duly authorized, even for the construction and operation of a street railway, does not impose an additional servitude upon the fee, and an abutting owner cannot recover compensation for damages for such use. In 15 Cyc. 676, the numerous authorities supporting this rule are collected. The Court of Appeals of Maryland has repeatedly followed it. *Poole vs. Falls Road Electric Ry. Company*, 88 Md. 533; *Peddicord v. Railroad Company*, 34 Md. 463. The rule has its foundation in the fact that the use of the highway by the street railway is not a new or different use from that for which the property was acquired, but exactly the kind of use for which a highway is ordinarily intended.

The Court of Appeals of Maryland, in *Peddicord v. R. R. Co., supra*, said (p. 480):

> "It is true that when the right of way was originally acquired and when it was granted to the turnpike company, it was not actually contemplated by any of the parties to the acquisition and grant, that it would be used for a passenger railway, yet it may be said to have been within the legal contemplation of all that it was to be used for all purposes by which the object of its creation, as a public highway could be promoted. The parties looked to the future —to 'forever,' if the company should last so long—

> as well as to the then present, and it cannot be supposed that the authors of its existence intended otherwise than that it should respond to whatever demands, new improvements and increased facilities might make upon it, so only that such demands must be always consistent with its character and purpose as a public highway."

These decisions are significant because they show that the use of a public highway by a common carrier by street railway or by other common carriers so long as its character as a highway is preserved is but an ordinary use thereof, and one contemplated when the highway was laid out as such. Those carriers who operate entirely within the boundaries of a state are, of course, subject to its jurisdiction and it may impose such restrictions upon them as it may see fit subject, of course, to the limitations of its own and the Federal Constitution. But as to those carriers who operate between different states, carrying goods in interstate commerce, no state can exercise any such authority. Where the highway is only used for the purposes of interstate transportation in the way in which it is commonly used and where the vehicles employed are such as are freely permitted to use it, then the question as to whether or not there shall be restrictions placed upon the extent of this interstate transportation is a matter exclusively within the jurisdiction of the Congress of the United States and no state has the power to interfere with it or to place any burden upon it.

Later in this brief there will be examined the contention that a state may in the exercise of its police power determine upon general considerations of public wel-

fare who shall be permitted to use motor trucks upon its highways for the purpose of public transportation in interstate commerce and exclude therefrom vehicles of the ordinary kind employed for such purpose. The point now under consideration is simply whether the ownership of highways by a state confers upon it any peculiar power over common carriers in interstate commerce employing vehicles of the kind generally used upon them.

This question has been expressly adjudicated by this Court in the case of *Adams Express Co. v. New York*, 232 U. S. 14. There the Adams Express Company was engaged in interstate commerce as a carrier of packages, and transacted its business in many states. Its business was handled by hauling packages received in New York City for points in states to the south to Jersey City where they were loaded on express cars of a railroad company; those destined to points north and east were taken to the terminals of railroad companies in New York City. It employed in New York 68 automobiles in hauling the packages to the terminals mentioned, and in delivering packages coming from other states to consignees in the city of New York. While the Company did some local business in the the State of New York, its interstate business comprised 98 per cent. of the total business transacted in New York City. The company had never been compelled to obtain a license for the conduct of its interstate business from the City of New York. Its wagons and drivers employed therein had never been licensed, except that for several years about 40 licenses for wagons and drivers had been taken out. This was done

as a result of a compromise between the city and the company, whereby the company agreed to take out this number without prejudice, asserting that it was a larger proportion to the total number of wagons than the local business warranted, and also that the latter was merely incidental to the interstate business, and hence not subject to the license requirements.

Later the city undertook, through its officers, to enforce certain ordinances requiring licenses for vehicles used in connection with an express business, and demanded that all wagons and drivers of the company should be licensed, threatening to arrest unlicensed drivers or unlicensed wagons, notwithstanding they might be engaged in interstate transportation, and to remove, if necessary, unlicensed wagons from the streets.

This Court held that the requirements of the Ordinances with reference to the procuring of licenses could not be regarded as imposing a fee or tax for the use of the streets; nor could they be considered as a regulation in the interest of safety in street travel. Other Ordinances, as the Court pointed out, provided for the "rules of the road" to which wagons of express companies, as well as those of other persons were subject. The requirement of the license was held to be a regulation of the express "business."

In holding that the requirement that these licenses should be obtained as a prerequisite to the right to engage in the interstate express business was void because in conflict with the commerce clause of the Federal Constitution, this Court said: (Italics ours.)

"* * * But if the above-mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that so construed they would be clearly unconstitutional. It is insisted that, under the authority of the state the ordinances were adopted *in the exercise of the police power.* But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith v. Alabama,* 124 U. S. 465; *Hennington v. Georgia,* 163 U. S. 299; N. Y., *N. H. & H. R. R. Co. v. New York,* 165 U. S. 628; *Lake Shore & M. S. Ry. Co. v. Ohio,* 173 U. S. 285. It must, however, be confined to matters which are appropriately of local concern. *It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulation cannot go so far as to deny the right to engage in interstate commerce, or treat it as a local privilege and prohibit its exercise in the absence of a local license. Crutcher v. Kentucky,* 141 U. S. 47, 58; *Robbins v. Shelby County Taxing District,* 120 U. S. 489, 496; *Lelopu v. Mobile,* 127 U. S. 640, 645; *Stoutenburgh v. Hennick,* 129 U. S. 141, 148; *Rearick v. Pennsylvania,* 203 U. S. 507; *International Text Book Co. v. Pigg,* 217 U. S. 91, 109; *Oklahoma v. Kansas Natural Gas Co.,* 221 U. S. 229, 260; *Buck Stove Co. v. Vickers,* 226 U. S. 205, 215; *Crenshaw v. Arkansas,* 227 U. S. 389; *Minnesota Rate Cases,* 230 U. S. 352, 401. As was said by this Court in *Crutcher v. Kentucky,* 141 U. S. p. 58, '*a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it.*'" (pp. 30,31.)

In contrasting those local police regulations which have to do with the safety of travel, with a requirement that a

license shall be procured from state authority to engage in an *interstate business*, the Court said (italics ours):

> "The sections now under consideration constitute a regulation of the express 'business.' Article I is entitled 'Business Requiring a License'; Sec. 305, containing the enumeration, provides that 'the following businesses must be duly licensed,' and Sec. 306 that 'no persons shall engage in or carry on any such business without a licenes therefor' under a stated penalty (*ante p.* 24, *note*). The right of public control, in requiring such a license, is asserted by virtue of the character of the employment, but while such requirement may be proper in the case of local or intrastate business, it cannot be justified as a prerequisite to the conduct of the business that is interstate. *Not only is the latter protected from the action of the state, either directly or through its municipalities, in laying direct burdens upon it,* but, in the present instance, Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves. Act of June 29, 1906, c. 3591, 34 Stat. 584; *Adams Express Co. vs. Croninger,* 226 U. S. 491, 505; *U. S. v. Adams Express Co.,* 229 U. S. 381."

It will be seen that in the above case the exact question here under discussion was fully considered, and it was determined expressly that the City of New York could not by reason of any proprietary interest in its streets exclude a common carrier from their use so long as all those regulations of the city respecting the public safety were complied with. It has already been shown that plaintiff in error had complied, and declared its intention of continuing to comply, with all such regulations. The only obstacle to its engaging in business was the assertion by the Public Service Commission of its

right to determine whether plaintiff in error should or should not do so. Palpably it is an attempt by the state not only to regulate and burden interstate commerce, but *to decide whether it shall be engaged in at all.*

The use which the plaintiff in error desired to make of the highways of Maryland was exactly the same use in all substantial respects as that which the Adams Express Company was held to have the right to make of the streets of New York without any interference from the authorities of that city. It is true that Congress had legislated with reference to the business of express companies, but the above quotation from the opinion of this Court will show that this fact did not form the basis of its decision. The decision was made upon the broad ground that no state has the power to make a license from it "a prerequisite to the conduct of the business that is interstate."

That Section 4 of the Act of 1922, Chap. 401, was intended to deal with this right to engage in interstate business, and was not concerned with the safety of the public upon the highways, appears not only from the language of the section, but is also clear from the fact that other sections of the article of the Code of Maryland, to which this Act was an amendment, namely, Article 36, Sections 133-200, made elaborate and detailed provisions respecting the "rules of the road" and the operation of automobiles thereon.

Furthermore, it appears from the opinion of the Court of Appeals of Maryland in this case construing this statute, that

> "The object and purpose of the Act is to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route, and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require. It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads."

It will be seen that the only aspect of public safety within the purview of the Act, as thus construed by the Court of Appeals, is the reduction of the number of motor trucks upon the highways resulting from the elimination of the trucks of any common carrier whose use are not essential to the needs and convenience of the public. This is but the assertion after all, of the power to determine what the needs and convenience of the public are with respect to interstate transportation, and of the right on the part of the state to exercise a power which has been delegated exclusively to Congress.

If it were shown that the highways of the state, which plaintiff in error proposed to use in its interstate business, were overcrowded to such an extent that limitations had to be put upon the number of motor trucks using them, and that such restrictions were applicable alike to everyone, a different question might be presented. But in the first place the allegations of the bill of complaint expressly negative any such contention, and these allegations, of course, are to be taken as true in this proceeding. It is averred "that said highways are not in fact overcrowded or unduly congested, and that all of

the bridges along said highways constituting the route mentioned in plaintiff's application, are constructed so as to permit travel of heavier burden than that which will be imposed upon them by use of the plaintiff's motor trucks for the purposes aforesaid'' (Record, p. 22).

Moreover, when there has been no attempt to restrict by legislation the use of the highways to the public generally, and when they are freely opened to everybody else, it is manifest that whatever may be the power of the State with respect to a carrier engaged in domestic commerce purely, it cannot under such circumstances exclude a carrier engaged in interstate commerce solely upon the fragile ground that their exclusion will result in the lessening of the number of vehicles upon the road and will to that extent promote the safety of the traveling public. If common carriers in interstate commerce could be excluded on any such ground when using exactly the same vehicles which are freely permitted upon the highways, then for the same reason the state would have the power to select any other form of interstate commerce and impose the same resrictions upon it, thus giving it control over the whole field of interstate commerce insofar as the use of its highways in that connection are concerned.

It cannot escape notice that the several recent decisions of the state and lower Federal Courts upon this subject*, in effect concede that there is no peculiar power

* *Northern Pacific Ry. Co. v. Schoenfeldt*, 123 Wash. 570; 213 Pac. 26.
Interstate Motor Transit Co. v. Kuykendall, 284 Fed. 882.
Liberty Highway Co. v. Michigan Public Utilities Co., 294 Fed. 702.
These decisions are doubted by the Supreme Court of Montana in *Interstate Transit Company v. Derr et al.*, 228 Pac. 624.

vested in the states by reason of their mere ownership of their highways, for they all announce that the legislation of the states undertaking to regulate interstate travel over highways is only sustainable in the absence of regulation by Congress. Obviously the power of Congress to regulate interstate travel over the highways of the states arises only from the commerce clause, and the admission that Congress may legislate upon the subject carries with it the admission likewise that the highways of the States are subject to the commerce clause of the Constitution, and that their mere ownership by the states does not itself give to them any additional power of regulating interstate commerce.

Whatever legislation the states may enact upon the subject must be justified upon the ground that the subject is only local in character, which in the absence of Congressional action the state may deal with, and is not a matter having to do with interstate commerce, national in character, as to which the absence of legislation by Congress is the equivalent of a declaration that it shall be free from any regulation at all.

It is submitted, therefore, upon this branch of the argument, that the asserted claim of power upon the part of the State of Maryland to control the use of its roads to the extent of excluding interstate transportation thereon by reason of its ownership of them, cannot be sustained. The right to engage in interstate commerce is operative over all the territory of the country, over all the channels of commerce, and upon complying with

those rules or regulations which govern the public generally in the use of these channels of commerce, any person or corporation is entitled to use them as a means of interstate intercourse.

The plaintiff in error having in this case complied with all such rules and regulations it could not be deprived of the use of the highways of the State for purposes of interstate transportation without a violation of its constitutional right.

II.

This Court has many times determined that no state can enact any legislation, which amounts to the laying of a burden upon interstate commerce. The effect of the commerce clause of the Constitution is to render commerce free among the several states. The failure of Congress to enact legislation is equivalent to the declaration of freedom from any state interference.

If this is true with respect to all forms of commerce, *a fortiori* must it be true with respect to such an elementary and indispensible form of interstate intercourse, as transportation by such vehicles as are commonly used over the highways of all the states of the Union. Manifestly, a matter involving practically the entire population of the country and an activity so universally engaged in by the people, must be regarded as national in character and susceptible only of uniform regulation, if regulation should be deemed necessary at all.

This principle has been consistently adhered to and many times declared by this Court.

In *Oklahoma v. Kansas National Gas Co.*, 221 U. S. 229, this Court considered the power of the State to forbid the use of its highways by a foreign corporation for the purpose of transporting natural gas by pipeline in interstate commerce. It held that where the highways were permitted to be used for the purpose of such transportation by domestic corporations, this use could not be denied to foreign corporations engaged in interstate commerce.

In answer to the contention that the denial by the states of such a use of the highway for the purposes of interstate commerce would remain effective until Congress should deal with the subject, this Court said:

> "There is here and there a suggestion that the state not having granted such right the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. *The inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar. State ex rel. Corwin v. Indiana & Ohio, Oil, Gas & Mining Co., supra; Benedict v. Columbia Construction Co.*, 49 N. J. Eq. 23, and also in *Haskell, Governor, et al. v. Cowham*, United States Circuit Court of Appeals, Eighth Circuit. In the latter case the Oklahoma statute was under review, and in response to the same contentions which are here presented these propositions were announced with citation of cases:
>
> " 'No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any sound article thereof.

> "'No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on'." (p. 261).

In order to avoid repetition the other decisions upon this question are referred to under the third proposition above stated.

III.

It should be emphasized at the outset of the discussion of this branch of the question that this is not a case where a state is attempting to regulate a business which it has permitted to be carried on, but one where it is absolutely prohibiting a business from being conducted at all.

However difficult it may be in some cases to lay down the boundary of state power with respect to legislation affecting the details of an existing interstate business, no such difficulty arises with respect to the question of its power to prohibit a lawful interstate business. In a long line of cases this Court has held that a state has no power whatever to require the obtaining of a license from a state as a prerequisite to engaging in interstate commerce. This was laid down in *Adams Express Company v. New York*, supra, in the unmistakable language already quoted in this brief.

In *Crutcher v. Kentucky*, 141 U. S. 47, there was involved an Act of the Legislature of Kentucky purporting to regulate agencies of foreign express companies by providing that the agent of any such company not

incorporated under the laws of that state, should not carry on business there without first obtaining a license from the state, and that, preliminarily thereto, he should satisfy the auditor of the state that the company he represented was possessed of an actual capital of at least $150,000. It was further provided that if he engaged in such a business without a license he should be subject to a fine. This Act was assailed by the United States Express Company upon the ground that it amounted to a regulation of interstate commerce by the State of Kentucky and was therefore void. This contention was sustained by this Court.

It will be observed that the Act provided that a license should be obtained before the agent could engage in the business in the State of Kentucky. The requirement with regard to the actual capital which the company should have was doubtless intended for the protection of the citizens of Kentucky who had business with the company. As the Act was applicable to both interstate and intrastate commerce, it plainly amounted to a prohibition by the state upon engaging in interstate commerce without the required license. This Court, speaking through Mr. Justice Bradley, said (italics ours):

> "*To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.*

"It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co. v. Tinker,* 94 U. S. 238. The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. *Telegraph Co. v. Texas,* 105 U. S. 460; *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 196, 205, 211; *Phila. Steamship Co. v. Pennsylvania,* 122 U. S. 326, 342; *McCall v. California,* 136 U. S. 104, 110; *Norfolk & Western Railroad v. Pennsylvania,* 136 U. S. 114, 118. As was said by Mr. Justice Lamar, in the case last cited: '*It is well settled by numerous decisions of this Court, that a state cannot under the guise of a license tax exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.*'

"We have repeatedly decided that a state law is unconstitutional and void which requires a party *to*

take out a license for carrying on interstate commrece, no matter how specious the pretext may be for imposing it. Pickard v. Pullman Southern Car Co., 117 U. S. 34; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104; *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U. S. 114.

"As a summation of the whole matter it was aptly said by the present Chief Justice in *Lyng v. Michigan*, 135 U. S. 161, 166: 'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection" (pp. 57-59).

In *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, the many decisions laying down the rule that the

requirement of a license by the State as a prerequisite to engaging in interstate commerce therein, is a direct burden upon such commerce and void under the commerce clause of the Constitution, are reviewed at length by Mr. Justice Harlan, and it is there shown that whatever form the attempt of the state to control the entrance of any person or corporation into the field of interstate commerce has taken, whether by license, tax or otherwise, these attempts on the part of the state have been held invalid.

The decision of the Court of Appeals of Maryland is based upon the ground that the use of motor trucks by the plaintiff in error, as a common carrier, would be injurious to the roads of the state, and that the state had the right in the absence of Federal legislation to prohibit their operation, where the need and convenience of the public did not require them. It held that this was a matter of local police regulation, and did not place any burden upon interstate commerce.

It is submitted that the complete answer to this position is that not only does such action on the part of the state place a burden upon interstate commerce, *but that it absolutely destroys it.*

The Court of Appeals cited and relied upon the *Minnesota Rate Cases*, 230 U. S. 352, and quoted from the opinion there delivered by Mr. Justice Hughes.

That case, however, did not involve any such question as is here presented. It dealt merely with the relation

of certain intrastate rates to interstate rates, and concerned simply the power of the State of Minnesota to put into effect rates which operated indirectly so as to affect certain interstate rates. While holding that Congress had the power to legislate under the circumstances so as to cure the evil, it was said by the Court that in the absence of such legislation the state's power to fix purely intrastate rates, although their effect was as above stated, could be exercised. There was no question in that case of an absolute prohibition upon interstate commerce, unless the approval of the state or one of its agencies was obtained.

The right to transport goods in accustomed ways, and to use existing instrumentalities for that purpose upon complying with the conditions imposed upon the public generally, is clearly interstate commerce, national in character. It is the basis of practically all interstate commerce. When a state undertakes to determine to what extent and under what limitations this interstate intercourse shall be permitted, it is assuming an authority exclusively vested in Congress. It is obviously one of those cases where the failure of Congress to act is a declaration that such form of intercourse shall remain free from regulation. As was stated by Mr. Justice Hughes, in the *Minnesota Rate Case*, supra:

> "If a state enactment imposes a direct burden upon interstate commerce it must fail regardless of Federal legislation. *The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of Federal regulation should be free.* If the Acts of Minnesota constitute a direct burden upon interstate

> commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected" (p. 396).

Whatever, therefore, can be fairly called a burden upon interstate commerce, no matter what the form of such commerce may be, is prohibited to a state, the effect of the Constitution being that all interstate commerce shall remain free from any burden from state action.

In the cases of *Crutcher v. Kentucky*, supra, and *Adams Express Company v. New York*, supra, and in the cases cited therein, the requirement that a license should be first obtained before an interstate business could be transacted, was held to be a direct burden upon interstate commerce and void. It will be observed that in all of them the license could have been obtained by complying with certain conditions, or simply by the payment of a tax. But in the present case nothing that plaintiff in error could do would enable it to engage in this business. It was prohibited from doing so until the Public Service Commission of Maryland, *in the exercise of its judgment*, decided that the public welfare and convenience justified its engaging in the business of a common carrier in interstate commerce.

The case thus presents a situation far more serious in its effect upon interstate commerce than any of the cases heretofore presented, because it asserts the authority of a state in the exercise of its own judgment to determine to what extent and by whom such commerce shall be carried on.

The Court of Appeals of Maryland in its opinion said:

> "If the contention of the appellant be correct that the attempted regulation of the use of the highways of this state by the Public Service Commission under the statute mentioned, is unconstitutional and void when applied to the appellee and others who apply for permits to engage in the transportation of freight and merchandise from points in this state to points in some other state, then there is no regulation of the use of the highways, nor can there be any until Congress sees fit to pass them, and this it may never do. If it does not these valuable highways of the state will be subject to the use of motor vehicles of all sizes and character by the persons mentioned. This should not be, and in our opinion is not the law."

It has been seen that there is legislation in Maryland of the most elaborate kind providing in detail for the protection of the state's highways and the public traveling thereon. Plaintiff in error has never challenged the validity of this legislation, nor its duty to comply in every respect therewith in its use of them. What it does claim is that this right to use the highways subject to all valid regulations must be accorded to it. Full power upon the part of the state to regulate this use *after it is* accorded is in no way disputed. It is suggested in the opinion of the Court of Appeals that Congress may never see fit to regulate the right to engage in public transportation by motor truck in interstate commerce. If it does not hereafter pass such regulations it will doubtless be for the same reason which has governed it in the past, that is to say, because of its belief that this right should remain unrestrained. As its exercise is

absolutely essential to that freedom of intercourse among the states, which it was the purpose of the commerce clause of the Constitution to secure, there may well be ground to doubt whether any legislation with respect to this fundamental right may be needed in view of the fact that the states have ample means of protecting their roads and their people by local police regulations respecting the details of its exercise, where they do not go to the extent of working a deprivation of it. This power of local police regulation has been fully recognized by this Court in the cases of *Kane v. New Jersey*, 242 U. S. 160, and in *Hendrick v. Maryland*, 235 U. S. 610.

In the latter case it was said (italics ours):

> "In the absence of national legislation covering the subject, a state may rightfully prescribe *uniform* regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles, those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress" (pp. 622-623).

Again it was stated in the same case:

> "In view of the many decisions of this Court there can be no serious doubt that where a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself, and so long as they are reasonable and fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce" (pp. 623-624).

It will be seen that while recognizing the power of the state, in the absence of action by Congress, to enact regulations for the protection of the highways and the public, it is at the same time declared by this Court that the right to travel over the highways in interstate commerce must be accorded.

In many other cases this Court has recognized the right of a state to legislate with respect to certain details in the operation of an interstate business. Thus in *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23; *Port Richmond & B. P. Ferry Company v. Hudson County*, 234 U. S. 317, it was held that a state had the power in the absence of Federal legislation to provide that the rates and service of a public service corporation should be reasonable. In these cases, of course, there was no attempt *to prohibit* interstate commerce, for necessarily the fixing of a rate for a given service, and requiring a service to be rendered, *necessarily presupposes the recognition of the right to engage in the business of furnishing such serv-*

ice. Such action of the state has to do only with details in the operation of an existing business.

The distinction between these cases and the instant case is emphasized by this Court in *Sault Ste. Marie v. International Transit Company*, 234 U. S. 333, where the City of Sault Ste. Marie, under state authority undertook to exact a license as a prerequisite to the right to conduct a ferry between Sault Ste. Marie, Michigan, and Sault Ste. Marie, Ontario. While this was an international ferry, and thus engaged in foreign commerce, this is of no significance, for both foreign and interstate commerce are governed by exactly the same principles as the Court points out.

In holding the attempted exaction of the license fee invalid, this Court said (italics ours):

> "It will be observed that the question is not simply as to the power of the state to prevent extortion and to fix reasonable ferry rates from the Michigan shore; it is not as to the validity of a mere police regulation governing the manner of conducting the business in order to secure safety and the public convenience. (See *Port Richmond &c. Ferry Co. v. Board of Chosen Freeholders*, ante, p. 317, decided this day.) The ordinance goes beyond this. The ordinance requires a municipal license; *and the fundamental question is whether in the circumstances shown the state, or the city acting under its authority, may make its consent a condition precedent to the prosecution of the business.* If the state, or the city, may make its consent necessary, it may withhold it. The appellee, having its domicile in Canada, is engaged in commerce between Canada and the United States. At the wharf which it leases for the purpose on the American shore, it receives and lands persons and property. *Has the State of Michigan*

the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent—if it chooses to give it—the payment of a license fee?

"*This question must be answered in the negative.* It is urged, on behalf of the city, that the state either directly or through its municipalities may establish and license ferries—may grant ferries franchises (*Fanning v. Grepoire*, 16 How. 524; *Conway v. Taylor's Executor*, 1 Black 603; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365). But, since the decision in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, it has been clear that, whatever authority the state may have for this purpose, *it does not go so far as to enable the state to interdict one in the position of the appellee from conducting the commerce in which it is engaged*, or justify the state in imposing exactions upon that commerce in the view that business of this character may be carried on only by virtue of its consent express or implied. In that case the ferry company was a New Jersey corporation, receiving and landing its passengers and property at its wharf in Philadelphia in substantially the same manner as the appellee transacts its business at its wharf in Sault Ste. Marie, Michigan. *The Court held that it was not within the power of the state to prevent the ferry company from so doing; that this was an essential part of the interstate transportation which the state could not forbid, or burden by a privilege tax.* See *Philadelphia & S. Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326, 343. * * *

"The fundamental principle involved has been applied by this Court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 496; *Leloup v. Mobile*, 127 U. S. 640, 645; *Stoutenburgh v. Hen-*

nick, 129 U. S. 141, 148; *McCall v. California*, 136 U. S. 104, 109; *Norfolk &c. R. R. Co. v. Pennsylvania*, 136 U. S. 114; *Crutcher v. Kentucky*, supra, p. 58; *Rearick v. Pennsylvania*, 203 U. S. 507; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 21; *Pullman Co. v. Kansas*, 216 U. S. 56; *International Text Book Co. v. Pigg*, 217 U. S. 91, 109; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 260; *Buck Stove Co. v. Vickers*, 226 U. S. 205, 215; *Crenshaw v. Arkansas*, 227 U. S. 389; *Minnesota Rate Cases*, 230 U. S. 352, 400; *Adams Express Co. v. New York*, 232 U. S. 14, 31, 32.

"Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists in the absence of Federal action a local protective power to prevent extortion in the rates charged for ferriage from the shore of the state, and to prescribe reasonable regulations necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the state could exercise either directly or by delegation. In this view, it is unnecessary to consider the question raised with respect to the treaty with Great Britain" (pp. 339-342).

Under the principle of the above decision it must be concluded that any attempt on the part of a state to make a permit from it a prerequisite to the right to engage in interstate transportation is in violation of the commerce clause of the Constitution and invalid.

CONCLUSION.

It is respectfully submitted that the three propositions laid down in the beginning of this discussion are fully established, and the action of the State of Maryland in prohibiting plaintiff in error from using the motor

trucks which have been described upon the highways of the state for the purpose of interstate transportation for hire must be adjudged unconstitutional and void.

It is further submitted that the decree of the Court of Appeals of Maryland dismissing plaintiff in error's bill of complaint should be reversed and the case remanded with the direction that the injunction be issued as prayed.

Respectfully submitted,

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WILLIAM L. RAWLS,

Counsel for Plaintiff in Error.

Supreme Court, U.S.
FILED
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WM. R. STANSBU
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 185.

GEORGE W. BUSH & SONS COMPANY,

Plaintiff in Error,

versus

WM. M. MALOY, J. FRANK HARPER AND EZRA B. WHITMAN, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR DEFENDANTS IN ERROR.

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State of Maryland,

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR DEFENDANTS IN ERROR.

The important question in this case is:

Has a foreign interstate common carrier of merchandise or freight, since the passage of the Maryland Act of 1922, Chapter 401, Section 4, the right to operate motor vehicles in the transportation of its interstate business upon the route or routes selected by itself over State, State-aided, and improved county roads and streets of

the State of Maryland, without the authority or permission of said State, upon its offer or intention of taking out the licenses required by law, and offering to comply in all respects with the laws of the State of Maryland and the rules and regulations passed in pursuance thereof, fixing and determining the size, weight, tread, and all other requirements specified in such laws, rules and regulations?

The mere statement of the question discloses the immense importance of the case to the people of Maryland. The State, at the cost of many millions of dollars to the taxpayers, has established a fine system of improved public highways, and is expending millions more in the extension, improvement and maintenance of this system. Some of the public highways over which the Plaintiff in Error seeks to operate its motor trucks, as instrumentalities of interstate commerce, were built by and are owned by the State, and others are the property of certain counties of the State. The State has declared that certain carriers of passengers, as well as common carriers of merchandise or freight by means of motor vehicles, shall not operate their motor trucks over streets and public highways of the State without permission granted by the Public Service Commission.

Jitney busses and taxi-cabs for the public transportation of passengers, and common carriers of freight and merchandise, are numerous, and all are operating their motor vehicles by the permission of the State. It is common knowledge that large trucks, such as the Plaintiff in Error proposes to use, are not only dangerous to the persons and property of other users of the road, but are destructive of the highways themselves and interfere a great deal with the convenience of travel.

If the position of the Plaintiff in Error be sustained, common carriers of freight or passengers by simply in-

corporating in an adjoining state and confining themselves to interstate commerce would escape all control of the State in matters of vital interest to the people.

The Court of Appeals of Maryland held that the Maryland Act of 1922, which required what is commonly called a "certificate of convenience" from the Public Service Commission of that State as a condition precedent to the right to operate a freight motor bus line over the public roads of the State, was a valid exercise of the police power of the State and applied to public carriers engaged in interstate as well as intrastate commerce.

The order of the Public Service Commission, finding "after due hearing, that the public welfare and convenience do not require the granting of the permits for which applications have been made * * * but that on the contrary the granting of such permits would be prejudicial to the welfare and convenience of the public," and refusing and dismissing said applications is found on pages 9, 10 and 11 of the Record.

The authority under which the Commission acted is, as the order recites, Section 4 of Chapter 401 of the Acts of the General Assembly of Maryland 1922, which reads as follows:

> "And be it further enacted, That it shall be the duty of the Public Service Commission of Maryland, upon the application of any motor vehicle owner for a permit to operate any motor vehicle for the public transportation of merchandise or freight over any specified route to investigate the expediency of granting said permit, the number of motor vehicles to be used, and the rate to be charged, and if, in the judgment of the Public Service Commission, it is deemed best for the public welfare and convenience that said permit should be granted, said Public Service Commission is hereby empowered and authorized to grant

such permit subject to such conditions and terms and for such duration of time, not exceeding the period of twenty years, as it may deem advisable. But, if said Public Service Commission deems the granting of such permit prejudicial to the welfare and convenience of the public, then the said Public Service Commission is hereby empowered and authorized to refuse the granting of same. The said Public Service Commission of Maryland is further empowered and authorized to make such rules and regulations as it may deem necessary to govern the control and operation of same, and enforce same by such penalties, or forfeitures, as it may prescribe, including the revocation of the permit granted under the provisions of this Act."

In the bill reference is made to the Act of 1910, Chapter 180, by which the Public Service Commission was created, and to the provision contained therein that nothing in that Act "shall be deemed or construed to apply to or operate upon interstate or foreign commerce," and the contention is made that the Act under which the order was passed restricted the power of the Commission to intrastate commerce by means of motor trucks, operating over the public highways of the State. But the Act of 1922, Chapter 401, Section 4, was not an amendment or addition to the Act creating the Public Service Commission. It was distinct, separate, and independent legislation, enacted to meet the needs of the State with respect to a matter with which the State had not theretofore dealt.

It made the Public Service Commission the agency of the State to grant or withhold the "certificate of convenience" in the interest of the public good, as the facts and circumstances of each application might require.

THE CONTENTIONS OF THE RESPECTIVE PARTIES.

The Plaintiff in Error contends that the action or order of the Commission, insofar as it applies to it—an inter-

state common carrier,—is repugnant to the commerce clause of the Federal Constitution, Art. 1, Sec. 8, Clause 3, which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

The defendants contend that the Act of 1922, Chapter 401, Section 4, which vested in the Public Service Commission the power to grant or refuse the permits applied for, is a valid exercise of the police power of the State.

ARGUMENT.

It is important in determining the legal principles which govern the case, to bear in mind that Congress has not assumed to regulate the transportation of interstate commerce by means of motor trucks or motor vehicles. Neither the interstate commerce Act enacted in 1887, nor any prior or subsequent Act of Congress has undertaken to regulate these instrumentalities for carrying on interstate commerce. This is admitted, and, therefore, if there exists any constitutional ground upon which the contention of the Plaintiff in Error can be sustained, it must be found not in any Act of Congress, but in the clause of the Federal Constitution above quoted.

There has, of course, been a multitude of cases arising under the commerce clause of the Federal Constitution, but it is thought that in a case like this, *where Congress has taken no action with respect to the interstate transportation here involved*, the Minnesota Rate Cases, 230 U. S. 352, contain a statement of the principles which should control this case.

The opinion in the Minnesota Rate Cases was written by Mr. Justice Hughes, in the course of which he said:

> "It has repeatedly been declared by this Court that as to those subject which require a general system or

> uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting State legislation.
>
> "The principle which determines this classification underlies the doctrine that the State cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

By reason of difference in the character, construction, width and location of roads and the strength of bridges in the various States, it appears doubtful if any general system or uniformity of regulation could be adopted, and as the matter admits of such "diversity of treatment according to the special requirements of local conditions," it has been left with the States until Congress sees fit to act.

In Hendrick v. Maryland, 235 U. S. 610, 59 L. Ed. 385, 35 Sup. Ct. Rep. 140, where the Maryland Act requiring certain non-residents to pay registration and license fees before operating motor vehicles on the public highways of the State was upheld, this Court said:

> "The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the states for better facilities, especially by the ever-increasing

number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the state put into effect the above described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines,—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.

"In Smith v. Alabama, 124 U. S. 465, 480, 31 L. Ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, consideration was given to the validity of an Alabama statute forbidding any engineer to operate a railroad train, without first undergoing an examination touching his fitness, and obtaining a license, for which a fee was charged. The language of the Court, speaking through Mr. Justice Matthews, in reply to the suggestion that the statute unduly burdened interstate commerce and was therefore void, aptly de-

clares the doctrine which is applicable here. He said:

"'But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves, they are parts of that body of the local law which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the state or in commerce among the states.'"

See also

Kane v. State, 242 U. S. 160, 61 L. Ed. 222, 37 Sup. Ct. Rep. 30.

The Hendrick case, supra, and the Kane case, supra, support our contention that the subject of the regulation of motor vehicles engaged in interstate commerce is not one which requires "a general system or uniformity of regulation" but is one that admits "of diversity of treatment according to the special requirements of local conditions," and is, therefore, a subject over which the "states may act within their respective jurisdictions until Congress sees fit to act."

That there is a necessity for regulation is evidenced by the fact that no less than thirty-one states of the Union have enacted statutes on the subject. The Court is referred to pages 11 and 12 of the brief filed on behalf of the various regulatory commissions as *amici curiae* in the pending case of Buck v. Kuykendall, No. 345, October

Term, 1924, where there is a reference to each statute passed by each of said States.

The question, therefore, narrows itself into one of reasonableness *vel non* of the Maryland statute.

In considering this question, we first call attention to the fact that the right asserted by the Plaintiff in Error is not the right of travel over the highway in the customary and ordinary way. The right asserted is in its nature special and extraordinary. In fact, the Plaintiff in Error claims the privilege, as distinguished from the right, of making the highway itself a place of business. It is this special and extraordinary use of the highway that the statute is designed to regulate.

In ex parte Dickey, 76 W. Va. 576, the Court said:

> "The right of a citizen to travel upon the highway and transport his property thereon in the ordinary course of life and business differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of the legislative power is that of regulation; but as to the latter, its power is broader, the right may be denied, or it may be permitted to some and denied to others because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

Schoenfeld v. Seattle, 265 Fed. 726;
Nolen v. Riechman, 225 Fed. 812;
State vs. Darazza, 118 Atl. 81 (Conn., 1922).
Gizzarelli v. Presbrey, (R. I.) 117 Atl. 359.

The Maryland Act, recognizing that "the movement of motor vehicles over the highways is attended by constant

and serious danger to the public, and is also abnormally destructive of the ways themselves" (Kendrick case, supra) was designed, as found by the Court of Appeals of that State (Record, p. 29) "to restrict to the needs of the public the number of motor vehicles used in the transportation of freight or merchandise upon any one route and thereby avoid the additional injury and damage to the roads or highways, and the danger to persons traveling thereon, that would result from the use of a greater number than the needs and convenience of the public require."

> "It must be that the safety of the traveling public is lessened by the increased number of motor trucks operating upon the roads." Opinion of the Court of Appeals of Maryland, (Record, p. 29).

The public for whose protection the Maryland statute was passed are all those who use the highways in the exercise of the right to travel over them which is common to all and which is freely accorded to all alike by the State, whether engaged in intrastate or interstate commerce. The Maryland Act, therefore, insofar as it assures and protects the common and ordinary right of citizens of other States in the use of the highways, so far from unreasonably restricting and forbidding interstate commerce, is in aid of such commerce. The width of the road, the character of its construction, the strength of the bridges, the amount of ordinary and customary travel on the road, the special and extraordinary uses to which it may have already been subjected, are all circumstances to be taken into consideration in determining whether or not an additional burden upon the road by way of a freight motor bus line is "prejudicial to the welfare and convenience of the public."

There must be some limitation upon such rights as are asserted by the Plaintiff in Error in this case. To make

the exercise of such rights depend upon the welfare and convenience of the public and to restrict or deny them if their exercise be prejudicial to such welfare and convenience, is both reasonable and necessary.

To support its contention the Plaintiff in Error relies upon *Crutcher v. Kentucky*, 141 U. S. 47, and *Adams Express Company v. New York*, 232 U. S. 14, and other like cases as conclusive of the question presented here. The principles announced in those cases, are, of course, admitted, but those cases are clearly distinguishable from this.

The facts are different and the principles applied are not applicable to the facts disclosed by this Record. They are all cases in which direct *burdens or restrictions* were laid either by an act of assembly or municipal ordinance upon interstate commerce.

In *Adams Express Company, supra*, it was decided that a municipality cannot require an express company to obtain a local license as a condition precedent to transacting, within the city, its interstate business, nor so far as interstate business is concerned, can it exact an annual license from the corporation.

In *Crutcher's case, supra*, it was held that a state law was unconstitutional which required a party to take out a license and file a statement with the State Auditor, showing that the company had an actual capital of a given amount as a condition precedent to carrying on interstate commerce. These were *direct* attempts to tax, or to forbid, interstate commerce until the regulations were complied with.

Neither by the Act of 1922 nor by the order of the Commission complained of, is it required that the Plain-

tiff in Error shall obtain a permit from the Public Service Commission *as a condition* of carrying on interstate commerce. Neither the Act not the order imposes any direct or indirect burden or restriction upon the plaintiff's *right* to engage in interstate commerce.

It is still free to carry on interstate commerce in Maryland. The only effect of the order is that it cannot operate its trucks over the highways of the State as it has done and proposes to continue to do. The fact is that neither the Act nor the order is a *commercial regulation.* The Act is a wise and valid exercise of the *police power* of the State to protect the highways and to provide for the safety and welfare of the people, and does not contravene the Federal Constitution or any Act of Congress.

The question presented in this case is before this Court in Buck v. Kuykendall, No. 345, October Term, 1924, and the Court's attention is called to the very complete briefs filed in that case by the appellee and by various regulatory commissions, appearing as *amici curiae.*

Respectfully submitted,

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